TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1956
CERTIORARI GRANTED JANUARY 28, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 666

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit	1	1
Appendix to Appellant's brief consisting of proceedings in the United States District Court for the Southern District of New York	a	1
Statement under Rule 15(b)	1	1
Indictment	2	2
Notice of motion to vacate sentence	3	4
Affidavit of Joseph Leary Delaney	7	7
Affidavit of Whitney North Seymour, Jr., in opposition to motion	14	11
Exhibit "A"—Blank form of indictment	17	13
Exhibit "B"—Blank form of indictment	18	14
Opinion, McGohey, J.	20	15
Opinion, Per curiam	23	17
Judgment	25	18
Clerk's certificate (omitted in printing)	26	
Order allowing certiorari	27	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 31, 1957

—3629-3

[fol. a]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 141-9

UNITED STATES OF AMERICA, Appellee,

vs.

FRANK COSTELLO, Defendant-Appellant

Appendix to Appellant's Brief

On Appeal from the United States Court for the Southern District of New York

[fol. 1] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT UNDER RULE 15(b)

Defendant was indicted and tried for the evasion of Federal Income Taxes by the filing of false tax returns. After a trial before Hon. John F. X. McGohey and a jury, the defendant was found guilty on three of the four counts in the indictment. The defendant was sentenced on May 17th, 1954 to five years imprisonment and ordered to pay a fine of $10,000 on each count.

On April 5, 1955, United States Court of Appeals for the 2nd Circuit reversed the judgment on the second count. The Supreme Court granted certiorari on the limited question of an indictment based on hearsay evidence and subsequently affirmed the Court of Appeals.

A motion was made on May 21, 1956 by defendant pursuant to Section 2255, Title 28, United States Code and Rule 35 of Federal Rules of Criminal Procedure to correct defendant's sentence on the grounds that the sentence was in excess of the maximum term permitted. Said motion was denied by the Hon. John F. X. McGohey in an opinion dated August 21, 1956. This is an appeal from said decision denying defendant's application to vacate and correct the illegal sentence.

[fol. 2] In United States District Court, Southern District of New York

United States of America,

against

Frank Costello, Defendant.

Indictment

The Grand Jury charges:

1. On or about the 14th day of March, 1947, in the Southern District of New York, Frank Costello, the defendant, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, in the Borough of Manhattan, City of New York, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $23,673.90 and that the amount of tax due and owing thereon was the sum of $8,338.72, whereas in truth and in fact, as he then and there well knew, his net income for the said calendar year was the sum of $31,630.54 upon which said net income he owed to the United States of American an income tax of $13,224.88. [Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

[fol. 3] Second Count

The Grand Jury further charges:

1. On or about the 9th day of March, 1948, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1947, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America, for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, in the Borough of Manhattan, City of New

York, a false and fraudulent joint income tax return, on behalf of himself and his said wife, wherein it was stated that their net income for the said calendar year was the sum of $17,307.23 and that the amount of tax due and owing thereon was the sum of $5,085.94, whereas, in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $72,561.45 upon which said net income there was owing to the United States of America an income tax of $41,215.53.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

Third Count

The Grand Jury further charges:

1. On or about the 14th day of January, 1949, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1948, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948 [fol. 4] by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for said calendar year was the sum of $12,325.30, and that the amount of tax due and owing thereon was the sum of $2,153.48, whereas in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $47,619.92, upon which said net income there was owing to the United States of America an income tax of $15,965.22.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

Fourth Count

The Grand Jury further charges:

1. On or about the 10th day of March, 1950, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1949 was married, did wil-

fully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for said calendar year was the sum of $22,110.70, and that the amount of tax due and owing thereon was the sum of $4,910.94, whereas in truth and in fact, as he then and there well knew, their [fol. 5] joint net income for the said calendar year was the sum of $61,739.18, upon which said net income there was owing to the United States of America an income tax of $23,521.40.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

Myles J. Lane, United States Attorney.

Foreman

In United States District Court, Southern District of New York

Notice of Motion to Vacate Sentence—May 15, 1956

Sir:

Please take notice that upon the annexed affidavit of Joseph Leary Delaney, duly sworn to on the 15th day of May 1956, the indictment and all the proceedings heretofore had herein, the defendant will move this Court, pursuant to Section 2255 of Title 28, United States Code, and Rule 35 of the Federal Rules of Criminal Procedure, at a stated term thereof for the hearing of motions in criminal causes, appointed to be held in Room 318 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 21st day of May 1956, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order vacating, setting aside [fol. 6] and correcting that part of the sentence which im-

posed five years imprisonment and a fine totalling $20,000 upon the grounds that such part of the sentence was imposed in violation of the Constitution and the laws of the United States, that the Court was without jurisdiction to impose such part of the sentence, and that such part of the sentence was in excess of the maximum authorized by law; and for such other and further relief as to the Court seems just and proper.

Dated: New York, New York,

May 15, 1956.

Yours, etc., Hays, St. John, Abramson & Heilbron, 120 Broadway, New York 5, New York, Delaney & Donoghue, 580 Fifth Avenue, New York 36, New York.

To: Hon. Paul W. Williams, United States Attorney, Southern District of New York.

[fol. 7] In United States District Court, Southern District of New York

Affidavit of Joseph Leary Delaney in Support of Motion

State of New York,
County of New York, ss.:

Joseph Leary Delaney, being duly sworn, deposes and says:

I am one of the attorneys for the above-named defendant, Frank Costello, and submit this affidavit in support of his motion for an order vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fine totalling $20,000.

After a trial before Hon. John F. X. McGohey, United States District Judge, and a jury, the defendant was found not guilty on the first count, and guilty on the second, third and fourth counts of an indictment charging him with willfully attempting to evade and defeat federal income taxes

for the calendar years 1946, 1947, 1948 and 1949, by filing false and fraudulent income tax returns for such years. On May 17, 1954, the defendant was sentenced to five years imprisonment on each count to run concurrently and to pay a fine of $10,000 on each count.

Subsequently, on April 5, 1955, the United States Court of Appeals for the Second Circuit reversed the judgment of conviction on the second count and affirmed the judgment of conviction on the third and fourth counts (221 F. 2d 668, 679). The effect of such was to reduce the alleged tax deficiency to $28,532.46. The Supreme Court on Oc- [fol. 8] tober 10, 1955, granted certiorari limited, however, to the single question whether an indictment and conviction can be sustained where only hearsay evidence had been presented to the Grand Jury (350 U.S. 819). On March 5, 1956, the Supreme Court affirmed (350 U. S. 359, 100 L. Ed. 317).

Said two counts in substance alleged that the defendant wilfully attempted to defeat and evade income taxes due for the calendar years 1948 and 1949 by filing with the Collector of Internal Revenue false and fraudulent income tax returns.

The indictment was brought under the provisions of the Internal Revenue Code of 1939. Section 145(b) of the Internal Revenue Code of 1939 provided in part:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under the same Internal Revenue Code of 1939, Section 3616(a) provided in part that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Said Section 3616(a) has been amended under the Internal Revenue Act of 1954 by omitting the phrase "with intent to defeat or evade" from the present Section, which is now numbered 7207.

[fol. 9] On April 30, 1956, the Supreme Court delivered its opinion in *Berra* v. *United States* (U. S.), a case involving the construction of Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939. The Court had granted certiorari limited to the question of whether it was error for the Trial Judge to refuse to give a requested instruction that the jury might return a verdict of guilty of the "lesser crime" under Section 3616(a) even though the indictment was specifically brought under Section 145(b). The Court affirmed, pointing out:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction."

In the majority opinion, Mr. Justice Harlan stated:

> "* * * here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616(a)). In this instance Sections 145(b) and 3616(a) covered precisely the same ground."

And Mr. Justice Harlan specifically noted:

> "No motions addressed to the validity of the indictment, judgment of conviction, or sentence under § 145(b) were made before, during or after trial."

Stating that the Supreme Court itself should "reverse this case or at least remand for resentencing under the mis-[fol. 10] demeanor statute, § 3616(a)," Mr. Justice Black, in a dissenting opinion in which Mr. Justice Douglas joined, pointed out that:

> "Although § 3616(a) unambiguously makes the conduct charged a misdemeanor punishable by no more

than one year in prison, the trial judge apparently felt that he was compelled to treat the offense as a felony because of the statement in the indictment that the conduct charged was in violation of Section 145(b)."

And added the following footnote:

"But see Williams v. United States, 168 U. S. 382, 389; United States v. Hutcheson, 312 U. S. 219, 229; Fed. Rules Crim. Proc., 7(c), which provides in part that: 'The indictment * * * shall state for each count the official or customary citation of the statute * * * which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment * * * or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.' Cf. Cole v. Arkansas, 333 U. S. 196."

Referring to the majority opinion, Mr. Justice Black, in a footnote, stated:

"Apparently the Court means by this to leave open to petitioner the opportunity to challenge his sentence by a motion to correct it under 23 U. S. C. § 2255. Of course I agree that a motion under that section would be appropriate, but I think petitioner is entitled to have it settled now."

[fol. 11] Mr. Justice Black further stated:

"The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616(a) and a felony under § 145(b). The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§ 145 and 3616. I think we should construe these sections so as not to place control over

the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

Mr. Justice Black then pointed out a basic principle of American law:

"A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attor- [fol. 12] ney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Yick Wo v. Hopkins, 118 U. S. 356, 370.

"* * * A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here."

The Government itself, in its brief in the *Berra* case, admits that "Section 3616(a) has frequently been utilized

by the Government in the prosecution of income tax cases" (page 23 of Brief filed in the Supreme Court).

The defendant here asserts that where Congress has made the specific offense of delivering or filing a false and fraudulent income tax return, with intent to defeat or evade the assessment, a misdemeanor punishable by a $1,000 fine or imprisonment not exceeding one year, or both, neither the Court nor the prosecutor may resort to the general language of a felony statute in order to increase the punishment where the indictment alleges that the defendant filed a false and fraudulent income tax return with intent to evade and defeat taxes or assessments. Thus any sen- [fol. 13] tence of more than a $1,000 fine or imprisonment for more than one year is in violation of his constitutional rights, especially those rights granted him under the Fifth, Sixth and Eighth Amendments.

On May 14, 1956, the defendant commenced serving the five-year sentence imposed against him and he is now a prisoner confined in the United States Detention Headquarters in New York City.

The defendant now moves this Court to vacate, set aside and correct that part of the sentence which imposed five years imprisonment and a fine totalling $20,000 upon the grounds that such part of the sentence was imposed in violation of the Constitution and laws of the United States, that the Court was without jurisdiction to impose such part of the sentence, and that such part of the sentence was in excess of he maximum authorized by law.

No motion for similar relief has been made by the defendant.

(S.) Joseph Leary Delaney.

(Sworn to May 15, 1956.)

[fol. 14] In United States District Court, Southern District of New York

Affidavit of Whitney North Seymour, Jr., in Opposition to Motion

State of New York,
County of New York,
Southern District of New York, ss.:

Whitney North Seymour, Jr., being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York and am familiar with the prosecution of this case. I make this affidavit in opposition to defendant's motion to vacate his sentence on the ground that he should have been sentenced for a misdemeanor rather than a felony.

The essence of defendant's motion is that his conviction was for an offense embraced by Section 3616a of the Revenue Code of 1939, since the indictment here refers to the filing of a "false and fraudulent joint income tax return" as the manner used in attempting to defeat and evade his taxes. This contention gives too much significance to formal matters of pleading. Although it principally raises questions of law to be dealt with in a memorandum, there are certain facts which bear on the contention and should be set out here.

The filing of false returns is alleged in the indictment as a "manner" of attempted evasion under Section 145(B), Title 26, United States Code. This is not the only "man-[fol. 15] ner" which might have been alleged under that section. A whole catalog of alternatives is set forth in *Spies* v. *United States*, 317 U. S. 492, at 499 (1943). Many of these other manners of evasion could just as easily have been alleged here.

The proof at the trial of this case showed that the defendant had, among others, used the following devices in his attempted evasion of income taxes:

1. A bookkeeping system in his slot machine business that eliminated basic collection slips and recorded income on recapitulation sheets with no indication of names of

individual collectors or other means of cross-checking receipts.

2. Receipt of distributions from the slot machine business in cash.

3. Operation of the gambling casino at Beverly Country Club with only pencilled daily total sheets, entered into the permanent corporate books once a year, all without supporting memoranda.

4. Failure to keep any records of other gambling income, which was reported in part in round figures on his tax returns as "miscellaneous".

5. Concealment of true ownership of assets: Sands Point home in name of Mrs. Costello paid for in $18,000 cash by the defendant; 79 Wall Street in name of Mrs. Costello paid for in $52,500 cash by defendant; Consolidated Television stock in George Wolf's name paid for in $22,000 cash by the defendant; lots in Hollywood, Florida, in name of Geigermans paid for in $20,000 cash apparently by the defendant.

6. Studious avoidance of checks in everyday transactions, except to prove charitable contributions.

7. Only checks deposited in defendant's bank account. No cash.

8. All principal dealings on a strictly cash basis.

[fol. 16] These tax evasion devices could just as easily have been alleged in the indictment as the manner of evasion instead of alleging the filing of false returns. The reason they were not is simple.

As a matter of uniform practice, the United States Attorneys' Offices have been directed by the Department of Justice to try to follow set forms in drawing tax evasion indictments. Annexed hereto as Exhibits A and B is the basic 145(B) form forwarded to our office in 1948 and amended in 1954. The allegation concerning the filing of a false return as a simple, straightforward "manner" of evasion characteristic of most tax cases which permits uniform pleading. Other forms exist for special cases, but this form is the basic one.

The indictment in this case obviously followed the standard form. The only significance of the false return allegation is that it alleges one of the manners of evasion, and in doing so follows a practice of uniform pleading. It is

too much to say that its effect is also to reduce a felony to a misdemeanor, when any other allegation as to the manner of evasion would not have done so.

This is the first time defendant has raised his present attack on the manner of pleading in the indictment. Trial was completed two years ago. The case has since been up to the Supreme Court and back. Had defendant made his motion before trial it would have been possible to cure any defect by seeking a superseding indictment. His application now is too late. By not making his motion before trial he waived the right to do so at all.

Wherefore, your deponent respectfully prays that defendant's motion to vacate be denied.

Whitney North Seymour, Jr., Assistant United States Atorney.

(Sworn to May 21, 1956.)

[fol. 17] Exhibit A, Annexed to Affidavit of Whitney North Seymour, Jr.

In the District Court of the United States for the —— District of ——

No. ——

The grand jury charges:

That on or about the —— day of ——, 19—, in the —— District of ——, ——, late of ——, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 19—, by filing and causing to be filed with the Collector of Internal Revenue for the —— Internal Revenue Collection District of ——, at ——, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $—— and that the amount of tax due and owing thereon was the sum of $——, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $——,

upon which said net income he owed to the United States of America an income tax of $——.

[fol. 18] In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

—— ——, Foreman.

—— ——

United States Attorney.

[Individual—Attempt to defeat and evade]

EXHIBIT B, ANNEXED TO AFFIDAVIT OF WHITNEY NORTH SEYMOUR, JR.

In the District Court of the United States for the —— District of ——

No. ——

(2, United States Code

Section 145(b))

UNITED STATES OF AMERICA

against

The grand jury charges:

That on or about the —— day of ——, 19—, in the —— District of ——, late of ——, did wilfully and knowingly [fol. 19] attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year [1] 19—, by filing and causing to be filed with the (Collector) (Director) of Internal Revenue for the —— Internal Revenue Collection District of ——, at ——, a false and fraudulent income tax-return wherein he stated that his net income [2] for said calendar year [1] was the sum of $—— and that the amount of tax due

---

[1] If fiscal year is involved substitute for "calendar year", "fiscal year ended ——"

and owing thereon was the sum of $——, whereas, as he then and there well knew his net income [2] for the said calendar year [1] was the sum of $——, upon which said net income he owed to the United States of America an income tax of $——.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

A True Bill.

—— ——, Foreman.

—— ——

United States Attorney.

[Individual—Attempt to defeat and evade]

Form No. 7

———

[fol. 20] In United States District Court, Southern District of New York

Opinion of McGohey, D. J.—August 21, 1956

McGohey, *D. J.*

The defendant has timely moved pursuant to Section 2255 of Title 28 U. S. C. A. and Rule 35 of the Federal Rules of Criminal Procedure for an order "vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fine totaling $20,000."

The defendant was tried on an indictment containing four counts which respectively charged that in each of the years 1946 through 1949 he wilfully attempted to evade payment of income taxes due the United States by "filing a false and fraudulent income tax return" in violation of Sec. 145(b) of the Internal Revenue Code of 1939. The jury, on May 13, 1954, returned verdicts of not guilty on the first count, and guilty on the second, third and fourth counts. The defendant was sentenced on each of the latter counts to a term of five years and a fine of $10,000, plus costs of pros-

[2] If adjusted gross income does not exceed $5000, and tax table is used substitute for "net income", "adjusted gross income".

ecution, the prison terms to run concurrently. The Court of Appeals reversed as to the second count and affirmed as to the third and fourth counts.[1] The Supreme Court, reviewing only the legal sufficiency of the evidence before the Grand Jury, affirmed.[2]

[fol. 21] This motion presents the question, not heretofore raised by the defendant, whether, in view of Sec. 3616(a) of the Internal Revenue Code of 1939, the Court could legally impose five-year terms and $10,000 fines.

Section 145(b) provides:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3616(a) provides that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The defendant does not contend that the latter section repealed the former. His contention is that since both sections cover precisely the same ground, "the specific offense of filing a false return with intent to evade taxes, under Sec. 3616(a) prevails over the general denunciation of attempting to evade taxes denounced by Sec. 145(b)" and therefore a sentence greater than one year and $1,000 fine on each count is illegal.

[fol. 22] The motion is denied on the authority of United

---

[1] 221 F. 2d 668.

[2] 350 U. S. 359.

States v. Moran[3] in which the Court of Appeals for this Circuit rejected a similar contention.

Settle order.

Dated: New York, N. Y., August 21, 1956.

John F. X. McGohey, *U. S. D. J.*

[fol. 23] In United States Court of Appeals for the Second Circuit, October Term, 1956

No. 183

(Submitted December 10, 1956)

Docket No. 24333

United States of America, Appellee,

v.

Frank Costello, Defendant-Appellant

Opinion—December 12, 1956

Before Swan, Medina and Waterman, Circuit Judges

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

Hays, St. John, Abramson, Heilbron, Delaney & Donoghue, *Attorneys for Appellant*; Osmond K. Fraenkel, Morris Shilensky, Joseph Leary Delaney and Jacob Kossman, of Counsel.

Paul W. Williams, United States Attorney, *for Appellee;* Arthur H. Christy, Robert Kirtland and William K. Zinke, Assistant United States Attorneys, of Counsel.

[fol. 24] Per Curiam:

Appeal from denial of a motion to correct a sentence imposed under 26 U. S. C. A. § 145(b). On the authority of *United States* v. *Moran*, 2 Cir., 236 F. 2d 361, certiorari denied November 13, 1956, the order is affirmed.

---

[3] 2 C.—F. 2d—; decided Aug. 15, 1956.

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

FRANK COSTELLO, Defendant-Appellant

JUDGMENT—December 12, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 26] [File endorsement omitted.]

[fol. 27] Supreme Court of the United States,

October Term, 1956

No. 666

Frank Costello, Petitioner

vs.

United States of America

Order Allowing Certiorari—Filed January 28, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 27a] Clerk's Certificate to foregoing transcript omitted in printing.

Office - Supreme Court,
FILED
DEC 2 9 195
JOHN T. FEY, Cl

Supreme Court of the United States

October Term 1956

No. 666

FRANK COSTELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,
Attorneys for Petitioner.

INDEX

	PAGE
(a) The Opinions Below	1
(b) Statement of Grounds of Jurisdiction	2
(c) Question Presented for Review	2
(d) Statutes Involved	2
(e) Statement of the Case	3
(g) The Reasons Relied on for the Issuance of the Writ	4
Conclusion	11
APPENDIX:	
Opinion of United States District Court	13
Opinion of United States Court of Appeals for the Second Circuit	16
Order of Affirmance	17

Table of Cases Cited

Berra v. United States, 351 U. S. 131	4, 5, 6, 8, 10
Kepner v. United States, 195 U. S. 100	6
Mac Evoy v. United States, 322 U. S. 102	6
Olsen v. Delmore, — Wash. 2d —, 295 P. 2d 324	9
Robinson v. United States, 142 F. 2d 431	6
State v. Cory, 204 Or. 235, 282 P. 2d 1054	9
State v. Pirkey, 203 Or. 697, 281 P. 2d 698	9
United States v. Achilli, 234 F. 2d 797, cert. den. 352 U. S. 916	5

PAGE

United States v. Beacon Brass Co., 344 U. S. 43 .... 7, 10
United States v. Chase, 135 U. S. 255 6
United States v. Cincotta, not yet reported (N. D. N. Y. Crim. 31842) 5
United States v. Gilliland, 312 U. S. 86 7
United States v. H. J. K. Theatre Corp., 236 F. 2d 502 5
United States v. Lange, 128 F. Supp. 797 7
United States v. Moran, 236 F. 2d 361, cert. den. 352 U. S. 909 ..... 4, 5, 6
United States v. Nicastro, 143 F. Supp. 756 5
United States v. Stever, 222 U. S. 167 8

Washington v. Miller, 235 U. S. 422 6

Other Authorities Cited

Federal Rules of Criminal Procedure, Rule 35 4

Internal Revenue Act of 1864, 13 Stat. 223 5

18 U. S. C. 80 7
18 U. S. C. 1001 7
26 U. S. C. 145(b) 2, 3, 5, 6, 7, 8
26 U. S. C. 3616(a) 2, 3, 4, 5, 6, 7, 8
28 U. S. C. 1254(1) 2
28 U. S. C. 2255 ..... 4, 5

Supreme Court of the United States

October Term 1956

No.

—o—

FRANK COSTELLO,

Petitioner.

vs.

UNITED STATES OF AMERICA.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal by the United States District Court for the Southern District of New York of petitioner's motion for a correction of his sentence after conviction for filing false income tax returns with intent to evade taxes.

(a) The Opinions Below

The opinions of the District Court and of the Court of Appeals have not yet been reported. Copies thereof are hereto annexed as Appendix A (pp. 13-16, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on December 12, 1956 and is final.

2. No application was made for rehearing.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

(c) Question Presented for Review

1. May a person convicted of having wilfully attempted to evade income tax be sentenced under 26 U. S. C. 145(b) of the Revenue Code of 1939 rather than under 26 U. S. C. 3616(a) of that Code, where the indictment charged only the filing of a false and fraudulent return?

(d) Statutes Involved

Internal Revenue Code 1939

§ 145. Penalties—

* * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than

$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

§ 3616. Penalties.

Whenever any person—

(a) False returns.

Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made:

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(e) Statement of the Case

Petitioner was indicted on four counts, each of which charged that he "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" (2a-4a).* The indictment made reference to 26 U. S. C. 145(b). The years covered were 1946 to 1949. The jury acquitted petitioner with regard to 1946; the Court of Appeals (221 F. 2d 668) set aside the conviction as to 1947. This Court (350 U. S. 359), limiting its review to the sufficiency of the evidence before the grand jury, affirmed the conviction.

Petitioner was sentenced to serve five years in prison on each count, the sentences to run concurrently, and was fined $10,000 on each count (7a, 20a). Thus, if the sentence was proper, petitioner must serve five years and pay $20,000.

---

* Parenthetic references unless otherwise indicated are to the Appendix in the court below.

Immediately after petitioner commenced serving his sentence (13a) he moved in the District Court under 28 U. S. C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure for correction of his sentence on the ground that Section 3616(a) of the 1939 Code controlled the sentence for the offense with which he was charged and that it could not exceed imprisonment for one year and fine of $1,000 on each count (5a-13a).

The District Court denied the motion (22a) on the authority of *United States* v. *Moran*, 236 F. 2d 361. The Solicitor General opposed certiorari in that case on the ground that the question was not properly presented by the record and this Court denied certiorari on November 13, 1956, 352 U. S. 909. The Court of Appeals was then asked in the instant case to reconsider the question decided in *Moran*, but refused to do so (*infra*, p. 16).

(g) The Reasons Relied on for the Issuance of the Writ

The court below has decided an important question of federal criminal law which should be reviewed by this Court and has misconceived the purport of this Court's decision in *Berra* v. *United States*, 351 U. S. 131.

In *Berra* the question with regard to the sufficiency of the sentence was not raised and the issue, therefore, not resolved. The Court left it open for the issue to be raised—as it has been here—under 28 U. S. C. 2255. Justices Black and Douglas believed the issue should have been faced then and there (351 U. S. at 137).

The issue is important, having been raised in a large number of cases since the *Berra* decision.[1] In *Moran* the Solicitor General recognized that it should be set at rest by this Court, but believed that had not been the appropriate occasion, because the issue had not been raised in the District Court.[2] Here, of course, it has been so raised.

In *Berra* this Court, assuming that Section 3616(a) as well as Section 145(b) applied to income tax prosecutions,[3]

---

[1] After this Court's decision in *Berra* a motion was made under 28 U. S. C. 2255 but the issue was avoided by the District Court's exercise of discretion in reducing the sentence to the misdemeanor level (Order, June 25, 1956, East. Dist. Missouri, Eastern Division, Cr. 27866(2)). In addition to *Moran*, 236 F. 2d 361, the same issue was decided in *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, application for certiorari pending under the name of *Ansell* v. *United States*, and *United States* v. *Achilli*, 234 F. 2d 797, cert. den. 352 U. S. 916, in all of which cases the issue was not originally presented by motion under Section 2255. In one case where such a motion was made the Court ruled that Section 3616(a) was not applicable to income taxes: *United States* v. *Nicastro*, 143 F. Supp. 756 (EDNY). See also *United States* v. *Cincotta*, not yet reported (NDNY, Crim. 31842).

[2] In the government's brief in opposition to certiorari in the *Moran* case the Solicitor General said:

> "These questions, arising from the overlap of the two Code provisions (see *Berra* v. *United States*, 351 U. S. 131), are being raised with increasing frequency in the lower courts. * * * Although it is desirable that the question be definitely resolved, the Court may consider that review by it should await the arrival of a petition and record properly presenting the issue."

[3] The legislative history of Section 3616(a) buttresses the fact that it applies to income tax returns. Section 3616(a) was first enacted as part of an Internal Revenue Act which contained an income tax. This was Chapter 173 of the 38th Congress, 1st Session, enacted 1864, 13 Stat. 223. Section 11 (13 Stat. 225) made it a duty on various persons "to make a list or return * * * of the amount of annual income * * *." Section 15 (*id.* 227—sometimes erroneously cited as 226) contains substantially the same language as 3616(a). Section 116 (*id.* 281) contains the provision relating to income tax. Section 118 (*id.* 282) provides that if an individual fails to file a return the assessor can assess. It imposes no other penalty. Sections 120-122 (*id.* 283, 285) impose specific taxes on certain corporations and provide a penalty of a fine for a failure to make a return but no penalty for a false return.

held (351 U. S. at 134) that the two sections "covered precisely the same ground" in that instance. And the relevant facts here are identical. The Court of Appeals in *Moran* limited this statement as applicable only to the issue of intent (236 F. 2d at 363, note 4). This, we submit, is not justified by anything said by this Court in *Berra*.

Petitioner makes two basic contentions: 1) that Section 3616(a) controls over Section 145(b) wherever, as here, the only charge in the indictment is the filing of a false return, on the familiar principle that in this respect Section 3616(a) is a specific statute, dealing only with the filing of false returns, whereas Section 145(b) is a general provision dealing with evasion of income taxes by any means; 2) even if it be held that either section might be applicable, then the section imposing lesser penalties must control as otherwise improper discretion would be vested in prosecutors which would conflict with the Constitution as an unlawful delegation or as denial of due process.

The Court of Appeals in *Moran* dealt only with the first of these issues although the second had been presented to it. While this omission was specifically called to that court's attention in the case at bar, it nevertheless adhered to its original reasons in *Moran*.

1. In *Moran* the court below apparently accepted the contention of both parties that a specific statute controls over a general one.[4] But it did not decide which of the two sections was the specific one. Instead it rested its entire decision on the statement that "each section requires an element of proof not required by the other" and considered the case "directly controlled" by *United States* v.

---

[4] Citing *MacEvoy* v. *United States*, 322 U. S. 102, 107, 74 S. Ct. 890, 88 L. Ed. 1163; *Washington* v. *Miller*, 235 U. S. 422, 428, 35 S. Ct. 119, 59 L. Ed. 295; *Kepner* v. *United States*, 195 U. S. 100, 125, 24 S. Ct. 797, 49 L. Ed. 114; *United States* v. *Chase*, 135 U. S. 255, 260, 10 S. Ct. 756, 34 L. Ed. 117; *Robinson* v. *United States*, 8 Cir., 142 F. 2d 431.

Beacon Brass Co., 344 U. S. 43, citing also *United States* v. *Gilliland*, 312 U. S. 86, and *United States* v. *Lange*, 128 F. Supp. 797. In the case at bar the court below has not added anything to its earlier consideration of the problem.

We submit that the question which of the two sections is the specific one and therefore controlling should be decided by this Court. It cannot be avoided by reliance on the cases cited by the court below. In each of those cases the indictment required proof other than was required under the alternative provision of law which the defense in those cases argued was applicable. In the case at bar the proof required by the indictment was identical under both sections.

Thus, in the *Beacon Brass* case a false statement which could have supported a conviction under 18 U. S. C. 80 would not by itself support a conviction under the section on which the prosecution rested, namely, 26 U. S. C. 145(b), because the latter section, but not the former, required proof of a wilful intent to evade taxes. In the *Gilliland* case the indictment (see 35 F. Supp. 181 at 183) had not charged a violation of the Hot Oil regulations, but merely the making of a false statement in a matter of federal concern. This was sufficient under 18 U. S. C. 80, but would not have been sufficient under the so-called Hot Oil statute. In the *Lange* case the indictment under 18 U. S. C. 1001 did not charge that the false statement was made under oath, whereas under the perjury statute it would have been necessary not only to charge that, but also to charge that the oath was validly administered.

In the case at bar the indictment charged the filing of a false return for the purpose of evading taxes. This charge comes precisely within both statutes. While it was essential to allege that this was in connection with income taxes to bring the case within Section 145(b), no prosecution could have been had under Section 3616(a) without

alleging, in identical language, that the return was filed for the purpose of evading taxes, and certainly it would have been necessary to state what tax was involved. We have, therefore, complete identity of allegations.

Coming then to the basic problem, Section 3616(a) covers the specific method of tax evasion here charged, namely, the filing of a false and fraudulent income tax return; Section 145(b) covers all methods. True, Section 145(b) deals with a more limited category of taxes, but that, we submit, is not an appropriate criterion. There are various other sections which deal with particular kinds of taxes which also use the same words as does Section 145(b), those dealing with Estate and Gift Taxes and Admissions and Dues (Int. Rev. Code of 1939, §§ 894, 1024, 1718). If each of these is to be deemed the "specific" section applicable regardless of the method of evasion, then Section 3616(a) will have no important use. Moreover, as the government stated in its brief in this Court in *Berra*, Section 3616(a) has been and is still being used for income tax evasions. Since it is the only provision dealing with the specific method of evasion which was the only method relied on in the indictment here, it should be held to be the specific statute dealing with that method and so controlling over any others.

2. On the other phase of the case, namely, the impropriety and unconstitutionality of permitting a prosecutor at his unlimited discretion to decide which person is to be prosecuted for a misdemeanor and which for a felony, we believe what Mr. Justice Lurton said many years ago in *United States* v. *Stever*, 222 U. S. 167, at 173-174, to be applicable here:

> "If, then, this indictment is also maintainable under § 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a

> scheme to defraud indictable and punishable under either of two distinct provisions, and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments. Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of punishment under one not possible under the other."

More recently the subject has received attention by the Supreme Courts of Oregon and Washington. Both have held unconstitutional laws which expressly attempted to give a prosecutor such discretion. *State* v. *Pirkey*, 203 Or. 697, 281 P. 2d 698; *State* v. *Cory*, 204 Or. 235, 282 P. 2d 1054; *Olsen* v. *Delmore*, — Wash. 2d —, 295 P. 2d 324. Clearly no federal prosecutor should be given that great power where Congress has not expressly indicated that it wanted him to have it and the result has, so to speak, come about through inadvertence.

In the first of these state cases the court said (203 Or. at 706-707, 281 P. 2d at 702-703):

> "* * * It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial, without having heard any evidence for the defendant, either on the issue of guilt or of mitigation, and on the sole basis of a prima facie case made against one still presumed to be innocent. * * * We see in this statute no pro-

vision whereby one charged with a misdemeanor could be sentenced as for a felony, however heinous the offense might after trial appear to have been. Again, if the defendant is proceeded against as for and convicted of a felony, there is no provision authorizing the court in its informed discretion to impose punishment as for a misdemeanor, however strong the evidence in mitigation might be. In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized delegation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

Directly in point is what Mr. Justice Black said (with the concurrence of Mr. Justice Douglas) in *Berra* (351 U. S. at 138, 140):

"* * * I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly.

"So far as I know, this Court has never approved the argument the Government makes here. It certainly did not do so in *United States* v. *Beacon Brass Co.*, 344 U. S. 43, upon which the Government seems to rely. * * *

* * *

"The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice."

CONCLUSION

We submit, therefore, that the writ should issue.

Respectfully submitted,

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,

Attorneys for Petitioner.

APPENDIX

(Opinion of United States District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

UNITED STATES

against

FRANK COSTELLO

—o—

McGOHEY, *D. J.*

The defendant has timely moved pursuant to Section 2255 of Title 28 U. S. C. A. and Rule 35 of the Federal Rules of Criminal Procedure for an order "vacating, setting aside and correcting that part of the sentence which imposed five years imprisonment and a fine totalling $20,000."

The defendant was tried on an indictment containing four counts which respectively charged that in each of the years 1946 through 1949 he wilfully attempted to evade payment of income taxes due the United States by "filing a false and fraudulent income tax return" in violation of Sec. 145(b) of the Internal Revenue Code of 1939. The jury, on May 13, 1954, returned verdicts of not guilty on the first count, and guilty on the second, third and fourth counts. The defendant was sentenced on each of the latter counts to a term of five years and a fine of $10,000, plus costs of prosecution, the prison terms to run concurrently. The Court of Appeals reversed as to the second count and

affirmed as to the third and fourth counts.[1] The Supreme Court, reviewing only the legal sufficiency of the evidence before the Grand Jury, affirmed.[2]

This motion presents the question, not heretofore raised by the defendant, whether, in view of Sec. 3616(a) of the Internal Revenue Code of 1939, the Court could legally impose five-year terms and $10,000 fines.

Section 145(b) provides:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3616(a) provides that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The defendant does not contend that the latter section repealed the former. His contention is that since both sections cover precisely the same ground, "the specific offense of filing a false return with intent to evade taxes, under Sec. 3616(a) prevails over the general denunciation

---

[1] 221 F. 2d 668.

[2] 350 U. S. 359.

of attempting to evade taxes denounced by Sec. 145(b)" and therefore a sentence greater than one year and $1,000 fine on each count is illegal.

The motion is denied on the authority of United States v. Moran [3] in which the Court of Appeals for this Circuit rejected a similar contention.

Settle order.

Dated: New York, N. Y.,
August 21, 1956.

JOHN F. X. MCGOHEY,
U. S. D. J.

---

[3] 2 C. — F. 2d —; decided Aug. 15, 1956.

(Opinion of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

Before:

SWAN, MEDINA and WATERMAN,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

HAYS, ST. JOHN, ABRAMSON, HEILBRON, DELANEY & DONOGHUE, *Attorneys for Appellant;* Osmond K. Fraenkel, Morris Shilensky, Joseph Leary Delaney and Jacob Kossman, of Counsel.

PAUL W. WILLIAMS, United States Attorney, *for Appellee;* Arthur H. Christy, Robert Kirtland and William K. Zinke, Assistant United States Attorneys, of Counsel.

PER CURIAM:

Appeal from denial of a motion to correct a sentence imposed under 26 U. S. C. A. § 145(b). On the authority of *United States* v. *Moran*, 2 Cir., 236 F. 2d 361, certiorari denied November 13, 1956, the order is affirmed.

(Order of Affirmance)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of December, 1956.

Present:

HON. THOMAS W. SWAN,
" HAROLD R. MEDINA,
" STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

against

FRANK COSTELLO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

AND WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

INDEX

Cases: Page

Achilli v. *United States*, 234 F. 2d 797, certiorari denied, 352 U. S. 916 4

Berra v. *United States*, 351 U. S. 131 ..... 2, 4

Cave v. *United States*, 159 F. 2d 464, certiorari denied, 331 U. S. 847 2

Doyle v. *United States*, 234 F. 2d 788, certiorari denied, 352 U. S. 893 4

Gaunt v. *United States*, 184 F. 2d 284, certiorari denied, 340 U. S. 917 1

Heasley v. *United States*, 218 F. 2d 86, certiorari denied 350 U. S. 882 4

Holland v. *United States*, 348 U. S. 121 1

Rick v. *United States*, 161 F. 2d 897 2

Smith v. *United States*, 348 U. S. 147 1

Spies v. *United States*, 317 U. S. 492 ..... 1, 3

United States v. *Beacon Brass Co.*, 344 U. S. 43 ..... 1, 4

United States v. *Croessant*, 178 F. 2d 96, certiorari denied, 339 U. S. 927 2

United States v. *Gilliland*, 312 U. S. 86 4

United States v. *Kafes*, 214 F. 2d 887, certiorari denied, 348 U. S. 887 3

United States v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U. S. 909 4

United States v. *Noveck*, 273 U. S. 202 4

United States v. *Raub*, 177 F. 2d 312 2

United States v. *Rosenblum*, 176 F. 2d 321 ..... 1, 4

United States v. *Smith*, 206 F. 2d 905 3

Statutes:

Internal Revenue Code of 1939:

Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b)) 1, 2, 3, 4

Sec. 3616 (a) (26 U. S. C. 1952 ed., Sec. 3616 (a)) 2, 4

28 U. S. C., Sec. 2255 .....

Miscellaneous:

Federal Rules of Criminal Procedure:

Rule 7 (c) 3

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Section 145 (b) of the Internal Revenue Code of 1939 makes it a felony, punishable by imprisonment for not more than five years and by a fine of not more than $10,000, to attempt wilfully "in any manner to evade or defeat" the income tax. In the overwhelming majority of cases prosecuted under Section 145 (b), the "manner" of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return. That such conduct violates Section 145 (b) has been uniformly and repeatedly recognized by this Court [1] and the courts of appeals.[2]

[1] *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 47; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 149, 159.

[2] E. g., *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1), certiorari denied, 340 U. S. 917; *United States* v. *Rosenblum*, 176 F.

The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616 (a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax.[3] In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145 (b), the proof that the defendant wilfully attempted to evade taxes by filing a false return[4] is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616 (a). In this respect Sections 145 (b) and 3616 (a) overlap.

On the basis of this overlap, petitioner contends that his sentence of five years' imprisonment and fines totalling $20,000 was illegal and in excess of the maximum authorized by law. He argues that wherever, as here, the method of evasion charged in the indictment is the filing of a false return, Section 3616 (a) "controls over" Section 145 (b), and no punishment can be imposed in excess of that authorized by the

---

2d 321, 329–330 (C. A. 7); *United States* v. *Croessant*, 178 F. 2d 96 (C. A. 3), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C. A. D. C.); *Cave* v. *United States*, 159 F. 2d 464, 466 (C. A. 8), certiorari denied, 331 U. S. 847.

[3] This Court so assumed, *arguendo*, in *Berra* v. *United States*, 351 U. S. 131, 133. The relevant authorities are cited in the Government's brief in the *Berra* case, pages 23–24.

[4] The proof at the trial of this case showed that the filing of false returns was not the only "manner" of attempted tax evasion used by petitioner. The evidence showed, in addition, the following: false bookkeeping entries, failure to keep records of income, concealment of assets, etc. (App. 14a–16a.)

former provision. The Government disagrees. Petitioner's argument, if accepted, would in effect repeal Section 145 (b) as applied to filing false returns with intent to evade the income tax. Moreover, petitioner labors under the misapprehension that the trial judge's authority to impose a sentence exceeding one year's imprisonment and $1,000 fine derives from the fact that the indictment cited Section 145 (b) as the statute alleged to have been violated.[5] The authority of a trial judge to impose sentence in a criminal case derives from Congress. Unless Section 145 (b) is deemed to be repealed by implication or otherwise inapplicable, it empowered the trial judge to impose the sentence he did in this case upon petitioner's conviction for wilfully attempting to evade income tax. If an indictment is valid in charging an offense under Section 145 (b),[6] and if the proof supports the de-

[5] Rule 7 (c) of the Federal Rules of Criminal Procedure provides:

> * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

[6] Section 145 (b) punishes wilful attempted evasion of income tax in *any* manner, without necessarily filing a false return. Evasion can be attempted in various other ways; the filing of a false return is not an essential ingredient of the offense of violating Section 145 (b). *Spies* v. *United States*, 317 U. S. 492, 499–500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887. Hence, omission of an allegation, like that in the instant case, that the "manner" of attempted evasion was the filing of a false return would not affect the validity of an indict-

fendant's conviction under that section, the trial judge is empowered, in his discretion, to impose any sentence that is lawful under that section, even though the proof may also show violation of another statute fixing a lesser penalty.

Although the Government believes the decision below to be correct, the question raised by petitioner, which was explicitly left undecided by this Court last term in the *Berra* case (351 U. S. 131, 135), is being raised with increasing frequency in the lower courts. The question was sought to be presented in several cases this term in which the Court denied certiorari, presumably because the record did not properly present the issue.[7] It may be assumed that, until definitively resolved by this Court, the question will continue to be litigated in the lower courts. Since this

---

ment under Section 145 (b). *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C. A. 8), certiorari denied, 350 U. S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C. A. 7). However, an indictment which failed to allege the filing of a false return could not be valid under Section 3616 (a), since that section in terms makes such a filing an essential element of the offense. Moreover, Section 3616 (a) punishes false returns under *every* kind of federal tax, while Section 145 (b) is limited to *income* tax violations. Accordingly, even though in a particular case the proof may show violation of both sections, the offenses defined in the two provisions are "not identical" and "are entirely distinct in point of law" (*United States* v. *Noveck*, 273 U. S. 202, 206); each "proscribes conduct not covered by the other" (*United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45). Cf. *United States* v. *Gilliland*, 312 U. S. 86, 93–96.

[7] *Doyle* v. *United States*, 234 F. 2d 788 (C. A. 7), certiorari denied, 352 U. S. 893; *Achilli* v. *United States*, 234 F. 2d 797 (C. A. 7), certiorari denied, 352 U. S. 916; *United States* v. *Moran*, 236 F. 2d 361 (C. A. 2), certiorari denied, 352 U. S. 909.

case arises on an application for correction of an allegedly illegal sentence, the question appears to be presented in a proper posture for decision here. Accordingly, the Government does not oppose the granting of the petition for certiorari.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.

JANUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE : 1957

JAN 23 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PERCY DAVIS AS AMICUS CURIAE

PEYTON FORD
ALAN Y. COLE
Attorneys for Amicus Curiae

Of Counsel:

FORD & LARSON
Washington, D. C.

JAMES C. HERNDON
Akron, Ohio

EDMUND D. DOYLE
Columbus, Ohio

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Interest of Amicus 1

Reasons for Granting the Writ 3

Conclusion 13

Appendix A 14

CITATIONS

CASES:

Achilli v. United States (CA 7), 234 F. 2d 797 cert. den. 352 U.S. 916 5

Bardin v. United States (CA 8), 224 F. 2d 255, cert. den. 350 U.S. 883 7

Bell v. United States, 349 U.S. 81 ..... 11, 12, 13

Berra v. United States, 351 U.S. 131, 221 F. 2d 590 ..... 3, 4, 5, 13

Davis v. United States, 226 F. 2d 331, cert. den. 350 U.S. 965 2

Doyle v. United States (CA 7), 234 F. 2d 788, cert. den. 352 U.S. 893 5

Fong Haw Tan v. Phelan, 333 U.S. 6 12

Gariepy v. United States (CA 6), 220 F. 2d 252, cert. den. 350 U.S. 825 7

Heasley v. United States (CA 8), 218 F. 2d 86, cert. den. 350 U.S. 882 7

Holmes v. United States, 267 F. 529 (CA 5, 1920) cert. den. 254 U.S. 640 8

Rosenberg v. United States, 346 U.S. 273 ..... 7, 8, 13

Smith v. United States, 145 F. 2d 643 (CA 10, 1944) cert. den. 323 U.S. 803 8

United States v. Britton, 108 U.S. 199 7

United States v. Cincotta (NDNY, Crim. 31842) .. 5

United States v. Eaton, 144 U.S. 677 7

United States v. Evans, 333 U.S. 483 ..8, 9, 10, 11, 12, 13

United States v. Hudson and Goodwin, 7 Cranch (U.S.) 32 7

United States v. Hutcheson, 312 U.S. 219 7

Page

United States v. Moran (CA 2), 236 F. 2d 361, cert. den. 352 U.S. 909 5
United States v. Nicastro (EDNY 1956), 143 F. Supp. 756 5
Viereck v. United States, 318 U.S. 236 7
Wallis v. Tecchio, 65 F. 2d 250 (CA 5, 1933) 12
Williams v. United States, 168 U.S. 382 7

STATUTES:

Immigration Act of 1917 Section 8 8
Internal Revenue Code of 1939 Section 145(b) (26 U.S.C. 145(b)) 3, 5, 6, 7, 8, 11
Section 3616(a) (26 U.S.C. 3616(a)) ..3, 5, 6, 7, 8, 11
Internal Revenue Code of 1954 Section 7207 6
28 United States Code Section 2255 ..... 2, 5

MISCELLANEOUS:

Rule 35, Federal Rules of Criminal Procedure .. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF PONCET DAVIS AS AMICUS CURIAE

With the consent of the parties, Poncet Davis files this brief as Amicus Curiae. The original copies of the consents of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

Amicus Curiae, Poncet Davis, has an interest in this case in that he has now pending in the Court of Appeals for the Sixth Circuit an appeal from a decision of the United States District Court for the Northern District of Ohio, *Poncet Davis* v. *United*

States, Criminal No. 20,632, in which the question involved is the same as that presented in the instant case.

Amicus Curiae was convicted of four counts of willfully attempting to defeat and evade payment of his income taxes by filing false and fraudulent income tax returns. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently, and fined $10,000 on each count, making a total sentence of five years of imprisonment and $40,000. The conviction was affirmed on appeal, 226 F. 2d 331, and certiorari was denied 350 U.S. 965. Thereafter, the District Court reduced Amicus' sentence from five to four years on each count, the sentences to run concurrently.

After commencement of service of sentence, Amicus Curiae filed a motion to correct his sentence under 28 United States Code, Section 2255, in the United States District Court in which he had been tried, contending that the crimes for which he had been convicted were, under law, misdemeanors rather than felonies, and that the maximum penalty prescribed for such misdemeanors was imprisonment for the period not exceeding one year and a fine not exceeding $1,000. The motion was overruled by the United States District Court for the Northern District of Ohio on September 27, 1956. (Appendix A, *infra*).

Amicus Curiae took an appeal from that decision to the United States Court of Appeals for the Sixth Circuit and filed his brief in that Court on December 17, 1956. The Government has been granted until February 14, 1957 to submit its brief. Counsel have been advised by the Clerk of the Sixth Circuit that on the

present state of the calendar in that Court, Amicus Curiae's case will not be reached for argument before April, 1957, at the earliest.

Since the question presented in the instant case is identical to the question presented in the appeal of Amicus Curiae to the Sixth Circuit, the decision in this case will, for all practical purposes, be dispositive of Amicus' appeal.

REASONS FOR GRANTING THE WRIT

1. The instant case squarely presents the issue expressly left open by this Court in its decision in *Berra* v. *United States*, 351 U.S. 131.

The indictment in that case, as in this case, charged the income tax evasion by filing false and fraudulent returns in claimed violation of Section 145(b) of the Internal Revenue Code of 1939 (26 U. S. C. 145(b)). Berra was convicted and sentenced to four years in prison on each of three counts, the sentences to run concurrently, the sentences being within the maximum authorized by Section 145(b).

At the trial, Berra's request for a special instruction to the jury that it might find him guilty of the lesser crime defined in Section 3616(a) of the Internal Revenue Code of 1939 (26 U.S.C. 3616(a)) was denied and that denial was assigned as error on appeal. The Court of Appeals for the Eighth Circuit affirmed, 221 F. 2d 590.

This Court's grant of certiorari in the *Berra* case was "limited to the question of whether it was error for the trial judge to refuse to give the requested instruction." 351 U.S. at 133. The opinion of the Court, by Justice Harlan, narrowed the focus of con-

sideration to the single issue presented by the limited grant of certiorari and concluded that it was not within the province of the jury to determine which of the two provisions of law should apply. "[T]here is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt." 351 U.S. at 135; and the trial judge's refusal to grant the requested instruction was upheld. The Court expressly emphasized the extremely narrow compass of the case, concluding:

> "The *only* question before us is *whether the jury should have been allowed to decide* whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction." 351 U.S. at 135. (Emphasis supplied.)

Justices Black and Douglas dissented. In their view, Berra's failure expressly to challenge the validity of the sentence and conviction before the District Court and the Court of Appeals was no obstacle to a complete determination of the matter by this Court.[1]

The majority opinion in the *Berra* case makes it plain that questions "as to the validity of petitioner's

---

[1] Justice Black, in dissent, wrote:

> "In my judgment the requested instruction was adequate to call the trial judge's attention to petitioner's contention that the offense charged was not a felony but a misdemeanor. But even if the question should have been raised again when the judge announced the sentence 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' * * * I think we should correct the plain error of the trial judge in sentencing petitioner under the felony statute." 351 U.S. at 137-138.

conviction and sentence" "might have been raised," but were not properly raised by requesting an instruction to the jury. As "questions of law for the court," it was—according to the majority—appropriate to raise them by way of challenge to the validity of the conviction and sentence. By Petitioner's motion in this case under 28 U.S.C. Sec. 2255 and Rule 35, Fed. Rules of Crim. Proc., the questions reserved by this Court in *Berra* were specifically and properly presented in the courts below, and are now properly before this Court.

2. As the Government has noted in its Memorandum filed in this case (at p. 4), the question left open by this Court in *Berra*, and raised by Petitioner, has been raised in many proceedings in the lower courts.[2] Moreover, it can arise in any case involving a prosecution under Section 145(b) of the 1939 Code where the charge is based upon the filing of false and fraudulent returns. As the Government has observed, in "almost every case prosecuted under Section 145(b), the proof * * * is identical with that required to prove * * * violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap." (Mem. for U.S., p. 2). In short, until the question presented by this case is definitely resolved by this Court, a cloud of doubt will remain as to the applicable penalty provision in almost every income tax evasion case.

---

[2] In addition to Amicus' case, see, e.g., *United States* v. *Nicastro* (EDNY 1956), 143 F. Supp. 756; *United States* v. *Cincotta* (NDNY, Crim. 31842) not yet reported.

In a number of cases where the issue was raised, it was not done so by challenge to the validity of the sentence in the trial court. See, e.g., *Doyle* v. *United States* (CA 7) 234 F. 2d 788, cert. den. 352 U.S. 893; *Achilli* v. *United States* (CA 7) 234 F. 2d 797, cert. den. 352 U.S. 916; *United States* v. *Moran* (CA 2) 236 F. 2d 361, cert. den. 352 U.S. 909.

The overlap between Sections 145(b) and 3616(a) was eliminated by the enactment of the Revenue Code of 1954[3] and the problem posed by this and other cases prosecuted under the 1939 Code will not arise in prosecutions under the 1954 Code. In the meantime, however, prosecutions under the 1939 Code continue and there are many defendants in Federal institutions today serving sentences imposed upon them for violation of the 1939 Code—sentences based on the assumption that the penalty is that provided by Section 145(b) rather than by Section 3616(a). It is particularly important therefore that any doubts concerning the applicable penalty in these cases be decided *now*. For in the event that it is ultimately determined that the penalty applicable in these matters is that provided by Section 3616(a) rather than 145(b), it will be small consolation for those defendants who will have already served all or significant portions of lengthy terms of imprisonment.[4]

---

[3] Section 7207 of the Internal Revenue Code of 1954, which replaced Section 3616(a) of the 1939 Code, no longer requires the element of "intent to defeat or evade" as was true under Section 3616(a). It was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b).

The changes between former Section 3616(a) and present Section 7207 are graphically illustrated in the following ramseyred version:

~~Whenever~~ Any person who willfully delivers or discloses to the ~~collector or deputy~~ *Secretary or his delegate* any list, return, account, or statement, *or other document,* ~~with intent to defeat or evade the valuation, enumeration, or assessment intended to be made~~ *known by him to be fraudulent or to be false as to any material matter,* ~~he~~ shall be fined not ~~more than~~ *exceeding* $1,000, or be imprisoned not ~~exceeding~~ *more than* one year, or both. ~~at the discretion of the court, with costs of prosecution.~~

[4] Prison sentences in 145(b) prosecutions have become substantial in recent years. Petitioner's term was set at five years;

3. The question presented in this case not only is timely and of widespread effect, but is also important because it touches upon a principle fundamental to our system of criminal justice. The Government has conceded that Sections 145(b) and 3616(a) overlap and that in almost every instance the proof to make out violation of one is identical to the proof required to convict under the other (Memo of U.S., p. 2). The necessary consequence is that in all such cases a situation is presented where two different and distinct penalties are applicable and Congress, to which the Constitution has reserved the function of declaring criminal penalties, *United States* v. *Hudson and Goodwin,* 7 Cranch (U.S.) 32; *United States* v. *Britton,* 108 U.S. 199; *United States* v. *Eaton,* 144 U.S. 677, *Viereck* v. *United States,* 318 U.S. 236, 241, 243-4, and hence of providing a standard, has failed to provide any clear criterion for choosing between them.

It is clear that no guidance can be obtained by referring to the indictment. This Court long ago declared: "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force . . . . We must look to the indictment itself, . . . although the representative of the United States may have supposed that the offence charged was covered by a different statute." *Williams* v. *United States,* 168 U.S. 382, at 389. See also *United States* v. *Hutcheson,* 312 U.S. 219, 229; *Rosenberg* v.

Amicus' term at five years, subsequently reduced to four years; Berra's term originally set at four years. See also, e.g. *Gariepy* v. *United States* (CA 6) 220 F. 2d 252, cert. den. 350 U.S. 825 (4 years); *Heasley* v. *United States* (CA 8) 218 F. 2d 86, cert. den. 350 U.S. 882 (3 years); *Bardin* v. *United States* (CA 7) 224 F. 2d 255, cert. den. 350 U.S. 883 (4 years).

United States, 346 U.S. 273, 306 (Opinion of Frankfurter, J.).

There are two possible answers to the dilemma posed by the overlap of Sections 145(b) and 3616(a): *first*, that no conviction under either provision is valid, because the two, when taken together in the context of this case, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation; and *second*, that if the two provisions may co-exist, then only the less harsh of the two may be applied in this case.

It has been long settled that a criminal statute can be void for vagueness as much where the punishment to be inflicted is uncertain or open to speculation as where the acts prohibited are ambiguously or poorly defined. See *Holmes* v. *United States*, 267 F. 529, 531 (CA 5, 1920) cert. den. 254 U.S. 640; *Smith* v. *United States*, 145 F. 2d 643, 644-5 (CA 10, 1944) cert. den. 323 U.S. 803. "And a statute which . . . leaves the sentencing court in doubt as to the punishment it may impose for the described offense, is void and inoperative." *Smith* v. *United States*, 145 F. 2d at 645.

This fundamental principle was unanimously applied by this Court in *United States* v. *Evans*, 333 U.S. 483. There the defendant was charged with concealing and harboring aliens in violation of Section 8 of the Immigration Act of 1917. Confusion existed as to the penalties applicable to the offenses charged in the indictment. The District Court granted a motion to dismiss the indictment and the Government appealed directly to this Court. Justice Rutledge, writing for a unanimous court, stated the problem of the case as follows:

"The case presents an unusual and a difficult problem in statutory construction. It concerns not so much Congress' intention to make concealing or harboring criminal as it does the penalty to be applied to those offenses . . . The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting . . . inconsistent answers on the statute's wording." 333 U.S. at 484-5.

The opinion then sets out the alternative contentions:

"the Government rests primarily on the clarity with which § 8 indicates Congress' purpose to make concealing or harboring criminal, rather than upon any like indication of legislative intent concerning the penalty. Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty." 333 U.S. at 485.

"Appellee . . . denies that it is possible, either from the section's wording or from the legislative history, to ascertain with any fair degree of assurance which one of the possible penal consequences Congress may have had in mind. From this he falls back upon the conclusion * * * that the task of resolving the difficulty goes beyond dispelling ambiguity in the usual sense of judicially construing statutes and, if attempted, would require this Court to invade the legislative function and, in effect, fix the penalty. The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all." 333 U.S. at 485-6.

The Court noted the extreme nature of the appellee's argument, remarking: "where Congress has exhibited clearly the purpose to proscribe conduct * * * and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose." (333 U.S. at 486). But the Court also observed:

> "But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions. But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree." 333 U.S. at 486-7.

After discussing the alternative punishments, this Court concluded:

> "If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the

> several possible constructions Congress thought to apply . . .
>
> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." 333 U. S. at 495.

The rule enunciated and applied by this Court in the *Evans* case appears applicable to the situation posed by this case. As in *Evans*, more than one penalty can imposed here and it is not possible "either from the [statute's] wording or from the legislative history, to ascertain with any fair degree of assurance which one of the penal consequences Congress may have had in mind." Thus, one solution to the problem posed in this case might be to apply the reasoning in *Evans*, and hold any conviction for income tax evasion based upon the filing of false and fraudulent returns under 145(b) or 3616(a) to be void, in view of the fatal ambiguity relating to penalty inherent in these statutes.

The second alternative might be to apply the less harsh of the two penalties in any case in which the two provisions apply.

The rule that only the less harsh of two applicable penalties can be imposed is no more than an application of the well accepted principle that where there is ambiguity in the construction of penal statutes, doubts will be resolved in favor of the accused. Only recently, this Court applied this principle in *Bell* v. *United States*, 349 U.S. 81, where the issue was whether the Mann Act made the simultaneous transportation of

more than one woman liable to cumulative punishment for each woman so transported.

In answering the question, this Court observed:

> "It is not to be denied that argumentative skill * * * could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it * * *. *When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.*" 349 U.S. at 83 (emphasis supplied.)

The philosophy underlying the principle was also pungently described:

> "And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. *It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.*" *Ibid.* (Emphasis supplied.)

The *Bell* case only reiterated what this Court has often said before, and in other contexts. See, e.g., *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10; see also *Wallis* v. *Tecchio*, 65 F. 2d 250, 252 (CA 5, 1933). And the rule is so well established that it was accepted in the *Evans* case as a basic axiom:

> "The argument is therefore *not merely that a rule of strict construction should be applied in petitioner's favor.* It is rather that the choice the Government asks us to make is so broad and so deep . . . that we have no business to make it at all." 333 U. S. at 486. (Emphasis supplied.)

The problem presented by the instant case is manifestly not as simple nor as one-sided as the Government suggests (Mem. of U.S., p. 3). It runs far deeper than the single question of whether there has been a repeal by implication. Moreover, the view for which the Government contends necessarily results in placing in the hands of the prosecuting officer the power to select between the two different applicable penalties in any given case; and this is a power which flies in the face of a basic tenet of our system of criminal justice that all persons must be treated equally under law. See *Berra* v. *United States,* 351 U.S. at 140 (Black, J., dissenting); *Rosenberg* v. *United States,* 346 U.S. at 306 (Frankfurter, J.); *Bell* v. *United States,* 349 U.S. at 83; *United States* v. *Evans,* 333 U.S. at 495.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

PEYTON FORD
ALAN Y. COLE
Attorneys for Amicus Curiae

Of Counsel:

FORD & LARSON
Washington, D. C.

JAMES C. HERNDON
Akron, Ohio

EDMUND D. DOYLE
Columbus, Ohio

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cr. No. 20632

UNITED STATES OF AMERICA

v.

PONCET DAVIS.

McNamee, District Judge.

The brief of the Government in opposition to defendant's motion to correct sentence refutes effectively and completely the arguments advanced in support of the motion and demonstrates convincingly that the sentence imposed was in all respects legal. For these reasons I adopt the Government's brief in toto and incorporate it in this opinion. I would add only the following: It is a firmly established rule of statutory construction that where an Act contains special provisions, they are to be considered as exceptions to a general provision in a separate earlier or later enactment. 50 *Am. Jur.* Sec. 367, p. 371; id. Sec. 561, p. 562. The general principle is stated in 82 *C.J.S.* Sec. 369, p. 843, thus:

> "It is a fundamental rule that where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment."

Section 3616(a) is a general statute embracing many types of false documents and relating to all classes of taxes. Section 145(b) defines as a felony a willful attempt "in any manner to evade or defeat any tax imposed *by this Chapter*," etc. (Emph. sup.) Section 145(b) is in

the chapter that deals specifically and solely with Income Tax and should be considered and treated as an exception to Sec. 3616(a). See *Robinson* v. *United States*, 142 F. (2d) 431, and cases therein cited. Compare *United States* v. *Tiplitz*, 105 F. Supp. 512. I am not unmindful of the apparent conflict of the above with *United States* v. *Gilliland*, 312 U.S. 86; but in view of the legislative history of Section 145(b) I am of the opinion that the principle hereinabove referred to is applicable.

The motion is overruled.

/s/ CHARLES J. McNAMEE
United States District Judge

Sept. 27, 1956

MAR 1 3 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS,
AGNES A. NEILL,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, New York,
Counsel for Petitioner.

PRESS OF FITCH S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Question Presented 2

Statement 3

Summary of Argument 4

Argument:

I. Petitioner's sentence constitutes a denial of due process and an unconstitutional delegation of legislative power 5

II. Section 3616 (a) is a specific statute dealing with false tax returns and prevails over section 145 (b), which is a general statute dealing with tax evasion by any means 15

III. The proper relief in this case is correction of petitioner's sentence to impose imprisonment for one year and a fine of $1,000.00 under each count of the indictment, the terms of imprisonment to run concurrently and not consecutively 19

Conclusion 24

CITATIONS

Cases:

Albrecht v. United States, 273 U.S. 1 8

Bell v. United States, 349 U.S. 81 15

Berkoff, Ex parte, 65 F. Supp. 976 6

Berra v .United States, 351 U.S. 131 .....6, 7, 8, 9, 12, 13

Blockburger v. United States, 284 U.S. 299 8

Bolling v. Sharpe, 347 U.S. 497 12

Bradley, In re, 318 U.S. 50 22

Cohen, Ex parte, 191 F. 2d 300, certiorari denied, 342 U.S. 947 6

Dillon v. United States, 218 F. 2d 97, certiorari dismissed, 350 U.S. 906 ..... 6, 9

Page

Dimenza v. Johnston, 131 F. 2d 47 20
Ekberg v. United States, 167 F. 2d 380 23
Finley v. California, 222 U.S. 28 10
Frankel v. United States, 131 F. 2d 756 22
Gavieres v. United States, 220 U.S. 338 8
Ginsberg & Sons v. Popkin, 285 U.S. 204 16
Graham v. West Virginia, 224 U.S. 616 10
Kepner v. United States, 195 U.S. 100 16
Kirsch v. United States, 174 F. 2d 595 6
Lange, Ex parte, 18 Wall. 163 ..... 20, 21, 22, 23
MacEvoy v. United States, 322 U.S. 102 16
McDonald v. Massachusetts, 180 U.S. 311 10
McKinney v. Finletter, 205 F. 2d 761 20
Missouri v. Ross, 299 U.S. 72 16
Moore v. Missouri, 159 U.S. 673 10
Morgan v. Devine, 237 U.S. 632 8
Olsen v. Delmore, — Wash. 2d. —, 295 P. 2d 324 ... 11
Oxman v. United States, 148 F. 2d 750, certiorari denied, 325 U.S. 887 22
Panama Refining Co. v. Ryan, 293 U.S. 388 13
Pennsylvania v. Ashe, 302 U.S. 51 10
Pereira v. United States, 347 U.S. 1 8
Peters v. Hobby, 349 U.S. 331 19
Prince v United States, 352 U.S. — 15
Robinson v. United States, 142 F. 2d 431 ..... 16, 19
Rosenberg v. United States, 346 U.S. 273 8
Rutledge v. United States, 146 F. 2d 199 23
Schechter Poultry Corp. v. United States, 295 U.S. 495 13
Skinner v. Oklahoma, 316 U.S. 535 10
Slick v. United States, 1 F. 2d 897 6
Spirou v. United States, 24 F. 2d 796, certiorari denied, 277 U.S. 596 20
State v. Cory, 204 Or. 235, 282 P. 2d 1054 11
State v. Pirkey, 203 Or. 697, 281 P. 2d 698 11
Steuart & Bro., Inc. v. Bowles, 322 U.S. 298, 404 ... 13
Taylor v. United States, 179 F. 2d 640 6
United States v. Achilli, 234 F. 2d 797, certiorari granted, 352 U.S. — 24
United States v. Beacon Brass Co., 344 U.S. 43 8
United States v. Benz, 24 Fed. Cas. No. 14, 576 6
United States v. Benz, 282 U.S. 304 21
United States v. Chase, 135 U.S. 255 15

Page

United States v. Chiarella, 214 F. 2d 838, certiorari denied, 348 U.S. 902 23
United States v. H. J. K. Theatre Corp., 236 F. 2d 502, certiorari denied *sub nomine* Ansell v. United States, 352 U.S. 969 24
United States v. Koppelman, 61 F. Supp. 1007 6
United States v. Moran, 236 F. 2d 361, certiorari denied, 352 U.S. 909 .....4, 23
United States v. Noveck, 273 U.S. 202 8
United States v. Pridgeon, 153 U.S. 48 20
United States v. Rosenstreich, 204 F. 2d 321 22
United States v. Rumely, 345 U.S. 41 19
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 15
Wilson v. Bell, 137 F. 2d 716 .....20, 22, 23

STATUTES:

18 U.S.C. § 4161 20
28 U.S.C. § 1254 1
28 U.S.C. § 2255 3

Internal Revenue Code of 1939:

Section 145(b) 2, 3, 4, 5, 6, 7, 8, 9, 15, 17, 18, 19, 23, 24
Section 894 (b) (2) (c) 17
Section 1024 (b) 17
Section 1718 (b) 17
Section 1821 (a) (2) 17
Section 2557 (b) (3) 17
Section 2707 (c) 17
Section 3616 (a) 2, 4, 5, 6, 7, 8, 9, 15, 17, 18, 19, 23, 24

Internal Revenue Code of 1954:

Section 7201 17
Section 7207 18

Act of June 30, 1864, c. 173, 13 Stat. 223 6

MISCELLANEOUS:

Federal Rules of Criminal Procedure, Rule 35 3
10 Mertens, Law of Federal Income Taxation 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court is reported at 146 F. Supp. 63; that of the Court of Appeals at 239 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1956 (R. 18). The petition for certiorari was filed on December 29, 1956, and granted on January 28, 1957 (R. 19). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Internal Revenue Code of 1939

§ 145. Penalties

* * * * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

§ 3616. Penalties

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

QUESTION PRESENTED

Whether a defendant convicted of having wilfully attempted to defeat and evade the income tax by filing a false and fraudulent income tax return may be sentenced under § 145 (b) of the Internal Revenue Code of 1939, rather than under § 3616 (a) of that Code.

STATEMENT

An indictment in four counts was returned against petitioner in the United States District Court for the Southern District of New York (R. 2-4). Count One of this indictment charged that petitioner "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by filing and causing to be filed . . . a false and fraudulent income tax return . . ." The second, third, and fourth counts contained similar charges for 1947, 1948, and 1949.[1] Each of these counts cited 26 U.S.C. § 145 (b) as the statute which petitioner was alleged to have violated.

The jury acquitted petitioner under the first count and convicted him under the remaining three counts (R. 1). He was sentenced to serve five years imprisonment on each count, the sentences to run concurrently, and was also fined $10,000.00 on each count (R. 1). The United States Court of Appeals for the Second Circuit reversed his conviction under the second count on the ground that the evidence was insufficient to sustain a guilty verdict, but affirmed as to the third and fourth counts (R. 1). 221 F. 2d 668. This Court, limiting its review to the validity of an indictment based solely upon hearsay evidence, affirmed the judgment of the Court of Appeals (R. 1). 350 U.S. 359.

On May 15, 1956, petitioner filed a motion in the District Court for correction of his sentence under 28 U.S.C. § 2255 and Rule 35 of the Federal Rules of

[1] These counts differed from the first count in that they charged the filing of a false joint income tax return, whereas the first count charged the filing of a false individual return.

Criminal Procedure (R. 4). He alleged that § 3616 (a) of the Internal Revenue Code of 1939 controlled the sentence for the offenses with which he was charged, and that the maximum sentence which could lawfully have been imposed upon him was imprisonment for one year and a fine of $1,000.00 under each count.

On August 21, 1956, the District Court denied this motion upon the authority of *United States* v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U.S. 909 (R. 15-17). On December 12, 1956, the United States Court of Appeals for the Second Circuit affirmed *per curiam* upon the authority of this same case (R. 17).

SUMMARY OF ARGUMENT

Petitioner has been convicted of attempting to defeat and evade his income taxes by filing false returns. This offense is a felony under § 145 (b) of the Internal Revenue Code of 1939 and a misdemeanor under § 3616 (a) of the same Code. It is conceded that both statutes require precisely the same proof in a case of this character, and hence that petitioner could not constitutionally be subjected to cumulative sentences under both of them for a single act of evasion.

The government contends that it may constitutionally elect to prosecute one offender under the felony statute and another offender under the misdemeanor statute, despite the identity of their offenses. Such power, however, would involve a flagrant denial of equal protection and, under these circumstances, a denial of due process under the Fifth Amendment. Moreover, it would involve an unlawful delegation of legislative power, since Congress is charged with the responsibility of determining whether a given offense

shall constitute a felony or a misdemeanor. The remedy is to permit prosecution only under the misdemeanor statute, in accordance with the established principle that penal statutes must be strictly construed not only as to the conduct prohibited but also as to the penalty imposed.

A second solution is to invoke the axiomatic rule that a "special" statute will always be applied in preference to a "general" statute covering the same subject. Here § 145 (b) is a "general" statute, interdicting attempts to evade taxes *in any manner*, while § 3616 (a) is a "special" statute, interdicting attempts to evade taxes *by filing a false return*.

The maximum term of imprisonment under § 3616 (a) is one year, since it is a misdemeanor statute. Petitioner, however, was given concurrent five year terms under both counts of the indictment. His sentence should consequently be corrected by substituting concurrent one year terms. Since he has already served one year of concurrent time under the original sentence, he cannot now be given consecutive sentences under the two counts. The double jeopardy clause, as interpreted by this Court, prohibits the imposition of consecutive sentences after a defendant has fully executed concurrent sentences for the same offenses.

ARGUMENT

I

Petitioner's Sentence Constitutes a Denial of Due Process and an Unconstitutional Delegation of Legislative Power

Petitioner has been indicted, tried, convicted, sentenced, and imprisoned for attempting to defeat and evade his income taxes by filing false income tax returns. It is conceded that this offense is prohibited

by both § 145 (b) and § 3616 (a) of the Internal Revenue Code of 1939.[2] It is further conceded that, in this instance, both sections cover precisely the same ground. The proof sufficient to sustain conviction under one is of necessity sufficient to sustain conviction under the other. Neither requires proof of an element not required by the other.

This conclusion is compelled by both reason and authority. Section 145 (b) makes it a felony to attempt to evade or defeat the income tax by filing a false return. Section 3616 (a) makes it a misdemeanor to file a false return for the purpose of defeating or evading the income tax. If there is a distinction between the acts outlawed by these two statutes, it

---

[2] The government's memorandum in response to the petition for certiorari herein so concedes at p. 2, and this Court so assumed, although *arguendo*, in *Berra* v. *United States*, 351 U.S. 131. The relevant authorities are summarized in the government's brief in *Berra*, which states at p. 24, n. 9:

> "We agree with petitioner, contrary to the court below (see *Dillon* v. *United States*, 218 F.2d 97, 103), that Section 3616 (a) applies to income tax violations. We think that its unqualified terms, the enactment of the predecessor of Section 3616 (a) in 1864 as part of a Revenue Act which included an income tax (Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285), and its collocation in the Internal Revenue Code of 1939, all point to its applicability to false income tax returns. This construction has been tacitly sustained in a number of cases. *Ex parte Cohen*, 191 F.2d 300 (C.A. 9), certiorari denied, 342 U.S. 947; *Taylor* v. *United States*, 179 F.2d 640, 643-644 (C.A. 9); *Kirsch* v. *United States*, 174 F.2d 595, 597-598 (C.A. 8); *Slick* v. *United States*, 1 F.2d 897 (C.A. 7); *Ex parte Berkoff*, 65 F.Supp. 976, 979-981 (D.Minn.); *United States* v. *Koppelman*, 61 F.Supp. 1007, 1008-1009 (M.D.Pa.); *United States* v. *Benz*, 24 Fed. Cas. No. 14, 576 (N.D.Ill.); see also 10 Mertens, *Law of Federal Income Taxation*, Sec. 55.66."

is a distinction without a difference. Common sense decrees that the prohibitions are coterminous.

This Court has expressly so held in *Berra* v. *United States*, 351 U.S. 131. There petitioner was indicted under § 145 (b) for attempting to evade and defeat his income tax by filing a false return. He contended that the jury should have been instructed on the "lesser included offense" delineated by § 3616 (a). This Court rejected his contention, on the ground that the proof necessary to support conviction under § 3616 (a) was precisely the same as the proof necessary to support conviction under § 145 (b), and there was hence no factual issue for determination by the jury.[3] Mr. Justice Harlan, speaking for the majority, pointed out, 351 U.S. at 134:

> "For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145 (b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616 (a)). In this instance §§ 145 (b) and 3616 (a) covered precisely the same ground."

Consequently, it is manifest that the double jeopardy clause would prohibit cumulative sentences under both of these sections for the same act of evasion. The law has long been settled that a single course of conduct may be punished under multiple statutes only where each offense requires proof of some element

---

[3] The *Berra* opinion, however, expressly reserved the question presented by this case, namely, the validity of a sentence in excess of the maximum penalty under § 3616 (a). 351 U.S. at 135.

not essential to the others.[4] Here, as this Court has already recognized, the proof required under both statutes is precisely the same, and hence this petitioner could not constitutionally be subjected to cumulative sentences for a single false return. Indeed, the government's brief in *Berra* so concedes (p. 30, n. 13):

> "There is no question of double jeopardy here, since the Government has not attempted to prosecute petitioner under both statutes. If it had so attempted, the question would depend on whether each offense 'requires the proof of a fact not essential to the other.' *Pereira* v. *United States*, 347 U.S. 1, 9, and cases cited. We think it clear that under that test the Government could not prosecute petitioner under both Section 145 (b) and Section 3616 (a) for filing a false income tax return with intent to evade the tax."

Since petitioner cannot be punished under both of these statutes, it follows that he must be punished under one or the other alone. The United States claims that it can select the applicable statute. If it elects to obtain an information charging that the defendant filed a false return with intent to defeat and evade his income tax, it contends that his punishment is controlled by § 3616 (a); if it elects to obtain an indictment charging that he attempted to evade and defeat his income tax by filing a false return, it contends that his punishment is controlled by § 145 (b). The offense is the same, but the penalties are radically dis-

---

[4] *Pereira* v. *United States*, 347 U.S. 1; *Rosenberg* v. *United States*, 346 U.S. 273 (opinion of Mr. Justice Clark); *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *Blockburger* v. *United States*, 284 U.S. 299; *United States* v. *Noveck*, 273 U.S. 202; *Albrecht* v. *United States*, 273 U.S. 1; *Morgan* v. *Devine*, 237 U.S. 632; *Gavieres* v. *United States*, 220 U.S. 338.

parate. In one case, the maximum penalty will be one year in prison and a fine of $1,000.00, while in the other case the maximum penalty will be five years in prison and a fine of $10,000.00. This disparity becomes even more striking where, as here, there are multiple counts. If petitioner had been convicted under all four counts of the indictment returned against him, he could have been imprisoned for *twenty years;* but if the prosecuting attorney had elected to file an information instead of an indictment, petitioner could not have been imprisoned for more than *four years.*

The Internal Revenue Code contains no criteria to guide a prosecuting attorney in making this election. The result is that different cases are governed by different prosecutors' conceptions of what "ought" to be a felony and what "ought" to be a misdemeanor. The government's brief in *Berra* contains this candid confession on the point (pp. 23-24, n. 9):[5]

> "... Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases in which the evidence of wilful evasion, though technically adequate to warrant the institution of proceedings under Section 145 (b), shows an offense of such *minor importance* as to justify the choice of a misdemeanor charge instead of felony. In numerous cases, for example, individual taxpayers evade *very small portions* of their income taxes by claiming false dependents in their returns." (Emphasis added.)

Of course, the Internal Revenue Code affords no standard for determining when an offense is of "minor

[5] To the same effect, see the government's brief in opposition to certiorari in *Dillon* v. *United States*, 218 F.2d 97, certiorari dismissed, 350 U.S. 906, at p. 8.

importance" or what sums constitute "very small portions" of the tax due. Nor is there any reason to suppose that the United States Attorney for the Southern District of New York, who prosecuted this case, would agree with the United States Attorney for the Southern District of California concerning the practical application of these terms. The result is that one defendant will be convicted of a felony, while another defendant will be convicted of a misdemeanor, for committing precisely the same offense under precisely the same circumstances.

It is clear that no state could confide such discretion to its prosecuting arm. The equal protection clause of the Fourteenth Amendment concededly invalidates any statute or statutory scheme whereby different offenders are exposed to different penalties for committing the same offense under the same circumstances. This Court has squarely held that different penalties may be imposed for the same offense only where the statute creates a reasonable classification of offenders and deals out the severe penalty to all who are similarly situated. *Pennsylvania* v. *Ashe*, 302 U.S. 51; *Graham* v. *West Virginia*, 224 U.S. 616; *Finley* v. *California*, 222 U.S. 28; *McDonald* v. *Massachusetts*, 180 U.S. 311; *Moore* v. *Missouri*, 159 U.S. 673. And where the statutory classification is unreasonable or arbitrary, having no relationship to a legitimate governmental objective, the statute is unconstitutional. *Skinner* v. *Oklahoma*, 316 U.S. 535.

Here the statutes contain no criterion, reasonable or otherwise, for the classification of offenders. The classification rests in the prosecutor's discretion, which may or may not operate unreasonably and arbitrarily.

The Supreme Courts of Oregon and Washington have recently held unconstitutional state statutes which expressly attempted to give a prosecutor such discretion. *State* v. *Cory*, 204 Or. 235, 282 P. 2d 1054; *State* v. *Pirkey*, 203 Or. 697, 281 P. 2d 698; *Olsen* v. *Delmore*, —— Wash. 2d ——, 295 P. 2d 324. In the *Pirkey* case, 203 Or. at 706-707, 281 P. 2d at 702-703, the court stated:

> "It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial, without having heard any evidence for the defendant, either on the issue of guilt or of mitigation, and on the sole basis of a prima facie case made against one still presumed to be innocent. . . . We see in this statute no provision whereby one charged with a misdemeanor could be sentenced as for a felony, however heinous the offense might after trial appear to have been. Again, if the defendant is proceeded against as for and convicted of a felony, there is no provision authorizing the court in its informed discretion to impose punishment as for a misdemeanor, however strong the evidence in mitigation might be. In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized delegation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

Certainly this Court should not permit a federal prosecutor to exercise discretion which no state prose-

cutor could constitutionally exercise. It has often been held that the first nine amendments to the Constitution impose upon the federal government restrictions more stringent than those which the Fourteenth Amendment imposes upon the states, but it has never been suggested that the Fourteenth Amendment constitutes a greater safeguard for individual liberty than the Bill of Rights. Even the government will scarcely urge that it should be permitted to make arbitrary discriminations in the enforcement of federal criminal statutes which are forbidden to the states in the enforcement of their criminal statutes.

Squarely in point is the case of *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500, where this Court said:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.
>
> * * * * *
>
> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Petitioner's position on this issue finds strong support in the opinion of Mr. Justice Black, dissenting, in *Berra*, 351 U.S. at 140:

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice."

This arbitrary authority to invoke either felony or misdemeanor provisions not only amounts to a denial of equal protection; it also involves an invalid delegation of legislative power. The law is settled that Congress has the responsibility for defining felonies and misdemeanors.[6] When it enacts two statutes punishing identical conduct as both a felony and a misdemeanor, with no criteria to guide the executive in determining which statute shall be applied in any given case, it has abdicated this important function to the executive. Whatever may be the result when Congress attempts a delegation of legislative power with some statutory standards to guide the executive in its exercise, the authorities are clear that no such delegation can be valid absent any statutory standards whatsoever.[7]

Mr. Justice Black recognized this second constitutional infirmity of the government's position in his *Berra* dissent, 351 U.S. at 139-140:

---

[6] Cf. *Stewart & Bro., Inc.* v. *Bowles*, 322 U.S. 398, 404.

[7] *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388.

> "The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.
>
> "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. . . .
>
> "A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions."

Under the foregoing authorities, it is plain that federal prosecutors cannot constitutionally elect to prosecute identical offenses under different statutes penalizing the same conduct with radically disparate sanctions. Two possible solutions have been suggested. The first is that both statutes are void because of a fatal ambiguity in the applicable penalty.[8] The second is that only the statute imposing the lesser penalty may be applied.

The latter solution appears more consonant with public policy and with the legislative intent. It is in accordance with the well settled canon that penal statutes must be strictly construed, not only as to the conduct proscribed but also as to the penalty imposed.

---

[8] Cf. brief of Poncet Davis as *amicus curiae* in support of the petition for certiorari in the case at bar, pp. 8-11.

A leading case in point is *Bell* v. *United States*, 349 U.S. 81, 83, where this Court stated:

> "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

Similar conclusions were reached in *Prince* v. *United States*, 352 U.S. ——, and *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218.

The rationale of these cases compels imposition of the lesser penalty in cases falling within the overlapping ambits of both felony and misdemeanor statutes. Only in this way can the courts avoid an unconstitutional discrimination between offenders who have committed identical crimes under identical circumstances.

II

Section 3616 (a) Is a Specific Statute Dealing With False Tax Returns and Prevails Over Section 145 (b), Which Is a General Statute Dealing With Tax Evasion by Any Means

It is axiomatic that a general statutory provision is never applied where there is a specific statutory provision dealing with the same subject. In the early case of *United States* v. *Chase*, 135 U.S. 255, 260, Mr. Justice Lamar stated:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' . . . This rule applies wherever an

> act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

The same principle was again enunciated by this Court in *Kepner* v. *United States*, 195 U.S. 100, 125, where Mr. Justice Day stated:

> "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."

Similar language may be found in *MacEvoy* v. *United States*, 322 U.S. 102, 107; *Missouri* v. *Ross*, 299 U.S. 72, 76; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208.

This principle was applied to overlapping penal statutes in *Robinson* v. *United States*, 142 F. 2d 431. There the Eighth Circuit upheld defendant's contention that he was improperly sentenced under a section of the penal code which imposed a maximum penalty of imprisonment for ten years, whereas he should have been sentenced under another section which imposed a maximum penalty of imprisonment for three years. The court pointed out, 142 F. 2d at 432:

> "[A]lthough the larceny of any property of the United States in general may be punished by ten years imprisonment, it is forbidden to impose more than three years for larceny of that particular United States property which belongs to the Post Office Department. Elementally, the special stands against the general. That is, where there is a law against any stealing, and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against

> stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception."

In the case at bar, it is clear that § 145 (b) is the "general" statute and § 3616 (a) the "specific" statute. Section 145 (b) prohibits any attempt to evade or defeat the payment of income taxes *in any manner*, whereas § 3616 (a) prohibits any attempt to defeat or evade the payment of income taxes *by filing a false return*. Of course, § 145 (b) as such applies only to income taxes, while § 3616 (a) applies to all f deral taxes. The precise language of § 145 (b) is repeated in numerous other sections of the 1939 Code, however, which cover virtually all of the major taxes imposed thereby. Similarly worded sections make it a felony to attempt in any manner to evade or defeat the estate tax,[9] the gift tax,[10] the admissions and dues tax,[11] the documents tax,[12] the narcotics tax,[13] and the firearms tax.[14] Thus § 145 (b) is in effect a "general" statute, applicable alike to all of the major taxes imposed by the 1939 Code.

This conclusion is reinforced by the Internal Revenue Code of 1954. The 1954 Code replaces all of the sections similar to § 145 (b) with a single section, which makes it a felony to attempt in any manner to evade or defeat "any tax imposed by this title."[15]

---

[9] Internal Revenue Code of 1939, § 894 (b) (2) (C).
[10] Internal Revenue Code of 1939, § 1024 (b).
[11] Internal Revenue Code of 1939, § 1718 (b).
[12] Internal Revenue Code of 1939, § 1821 (a) (2).
[13] Internal Revenue Code of 1939, § 2557 (b) (3).
[14] Internal Revenue Code of 1939, § 2707 (c).
[15] Internal Revenue Code of 1954, § 7201.

This Code also revised § 3616 (a) to eliminate the necessity for an intent to defeat or evade payment of the tax,[16] so that the question presented by this case cannot arise under present law. Assuming for the purpose of illustration, however, that Congress had carried forward § 3616 (a) without amendment, it is too clear for dispute that the successor to § 145 (b) and its companion sections would be a "general" statute, while § 3616 (a) would be a "special" statute. Under this hypothetical state of the law, one section of the Code would outlaw any attempt to evade or defeat any tax *in any manner*, while another section of the same Code would outlaw any attempt to defeat or evade any tax *by filing a false return*.

The foregoing hypothesis differs from the situation presented by the case at bar only in that the Internal Revenue Code of 1939 contained multiple sections, each outlawing in identical language any attempt to evade or defeat a certain tax in any manner. The prohibition was repeated for each major tax imposed by the Code, instead of appearing only once as it does in the 1954 Code. This difference, however, is plainly a difference of draftsmanship, and not of substance. The decision of the case at bar should not be made to turn upon such niceties. The result should be the same as if the 1939 Code, like the 1954 Code, had enunciated but once the general prohibition against attempting to evade or defeat the payment of any tax in any manner. Section 145 (b) and its companion sections must be regarded as what they in fact are, namely, multiple pronouncements of a single statutory command.

---

[16] Internal Revenue Code of 1954, § 7207.

Viewed in this perspective, § 145 (b) is a "general" statute and § 3616 (a) is a "special" statute within the meaning of the foregoing authorities. The situation is indistinguishable from that presented to the Eighth Circuit in *Robinson*, and the outcome must be the same unless this Court is prepared to repudiate a doctrine which it has hitherto regarded as axiomatic.

This canon of statutory construction compels especial respect where, as here, its application will avoid serious constitutional questions. It is settled that this Court will, wherever possible, construe a statute so as to avoid serious question as to its constitutionality. *Peters* v. *Hobby*, 349 U.S. 331; *United States* v. *Rumely*, 345 U.S. 41. In this case, there are grave issues involving the scope of the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment. These issues may be completely avoided by applying the axiomatic principle that a special statute will always be applied in preference to a general statute embracing the same subject matter. The constitutional effect of overlapping statutes which punish identical conduct as both a felony and a misdemeanor may then await disposition in a case amenable to no other resolution.

III

The Proper Relief in This Case Is Correction of Petitioner's Sentence to Impose Imprisonment for One Year and a Fine of $1,000.00 Under Each Count of the Indictment, the Terms of Imprisonment to Run Concurrently and Not Consecutively

The maximum sentence which could have been lawfully imposed upon petitioner was imprisonment for one year and a fine of $1,000.00 under each count of the indictment. He was in fact sentenced to imprison-

ment for five years and a fine of $10,000.00 under each count, the terms of imprisonment to run concurrently. It is conceded that he has already served more than one year of imprisonment under this sentence.[17]

The authorities are unanimous that a sentence in excess of the statutory maximum is void only as to such excess.[18] The sentence in this case was therefore valid insofar as it imposed concurrent terms of imprisonment up to one year. Petitioner has fully executed this valid portion of the sentence. Consequently, he cannot constitutionally be subjected to further punishment.

This result is compelled by the landmark case of *Ex parte Lange*, 18 Wall. 163. There petitioner was sentenced to imprisonment for one year *and* fined $200.00 under a statute permitting imprisonment for one year *or* a fine of $200.00. After petitioner had paid the fine and served five days of his prison sentence, he brought a writ of habeas corpus. The trial court vacated his sentence and imposed a new sentence of imprisonment for one year. This Court reversed, holding that the double jeopardy clause prohibits further punishment after a defendant has fully executed the valid portion of his initial sentence. The opinion states, 18 Wall. at 176:

---

[17] Petitioner served thirty-five days of this sentence in 1954, prior to his enlargement upon bail by Mr. Justice Jackson. 99 L.Ed. 1291. He was again imprisoned under this sentence on May 14, 1956 (R. 10). It is conceded that he has been credited with statutory allowances for good time pursuant to 18 U.S.C. § 4161.

[18] *United States* v. *Pridgeon*, 153 U.S. 48; *McKinney* v. *Finletter*, 205 F.2d 761; *Wilson* v. *Bell*, 137 F.2d 716; *Dimenza* v. *Johnston*, 131 F.2d 47; *Spirou* v. *United States*, 24 F.2d 796, certiorari denied, 277 U.S. 596.

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offence. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for the offence was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

The rule of the *Lange* case was reaffirmed in *United States* v. *Benz*, 282 U.S. 304, 307, where this Court stated:

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'"

To the same effect is the case of *In re Bradley*, 318 U.S. 50, 52. There, as in *Lange*, petitioner was sentenced to imprisonment *and* fined under a statute permitting imprisonment *or* a fine. He commenced service of his term of imprisonment on September 28 and paid his fine on October 1. A few hours after he paid the fine, the court realized its mistake and sought to amend the sentence by remitting the fine and retaining only the term of imprisonment. This Court reversed, holding that the attempted amendment of petitioner's sentence was a nullity.

> "When, on October 1, the fine was paid to the clerk and receipted for by him, the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end. . . .
>
> "It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint."

The *Lange* rule has been repeatedly applied by the federal courts of appeals. See *United States* v. *Rosenstreich*, 204 F. 2d 321; *Wilson* v. *Bell*, 137 F. 2d 716; *Frankel* v. *United States*, 131 F. 2d 756. Cf. *Oxman* v. *United States*, 148 F. 2d 750, certiorari denied, 325 U.S. 887.

It is true that the trial court might lawfully have imposed consecutive terms of imprisonment for one year under each count, resulting in an aggregate term of two years. The fact remains, however, that the

sentences actually imposed and served were concurrent. It is hornbook law that a prisoner serving concurrent sentences each day serves a portion of every such sentence. This petitioner, therefore, has already served one year under each count of the indictment. Neither the sentencing court nor any other court can retroactively convert this service into one year under one count of the indictment.

The federal courts have frequently applied the *Lange* rule where there has been an attempt to transform concurrent sentences into consecutive sentences. See *United States* v. *Chiarella*, 214 F. 2d 838, certiorari denied, 348 U.S. 902; *Ekberg* v. *United States*, 167 F. 2d 380; *Rutledge* v. *United States*, 146 F. 2d 199. In all three of these cases, the courts held that consecutive sentences could not be substituted for concurrent sentences once the defendant had commenced serving his term of imprisonment.[19]

Any other conclusion would have completely unjust consequences in cases of this character. Here, of course, petitioner was originally given concurrent five year terms under two counts, which would result in a longer period of imprisonment than consecutive one year terms under these two counts. In many cases, however, the concurrent terms imposed under § 145 (b) would result in a shorter period of imprisonment than consecutive one year terms under § 3616 (a). In the case of *United States* v. *Moran*, *supra*, for example,

[19] In the *Chiarella* case, the consecutive sentences sought to be imposed would have resulted in a shorter aggregate term of imprisonment than the sentences initially imposed, while in the *Ekberg* case, the consecutive sentences would have resulted in the same aggregate term of imprisonment as the sentences initially imposed. This factor, however, was not regarded as removing the cases from the *Lange* rule. Cf. *Wilson* v. *Bell*, 137 F.2d 716.

defendant was given concurrent two year terms under three counts of an indictment charging violations of § 145 (b). It would be both absurd and unjust to suggest that he might be penalized for moving to correct his sentence by substituting consecutive one year terms under these three counts, resulting in an aggregate term of imprisonment one year longer than his original "excessive" sentence.[20]

The foregoing authorities lead irresistibly to the conclusion that it is now too late to impose consecutive terms of imprisonment upon this petitioner. His sentence is void only insofar as it is in excess of the maximum penalty permissible under § 3616 (a). It should be corrected by eliminating such excess, that is, by reducing the term of imprisonment under each count from five years to one year and the fine under each count from $10,000.00 to $1,000.00. It cannot constitutionally be altered in any other respect, because petitioner has fully executed a valid portion thereof.

CONCLUSION

For the foregoing reasons, petitioner urges that the judgment of the court below should be reversed and the case remanded, with directions to correct petitioner's sentence. The sentence, as corrected, should impose imprisonment for one year and a fine of $1,000.00 under Count Three and imprisonment for one year

---

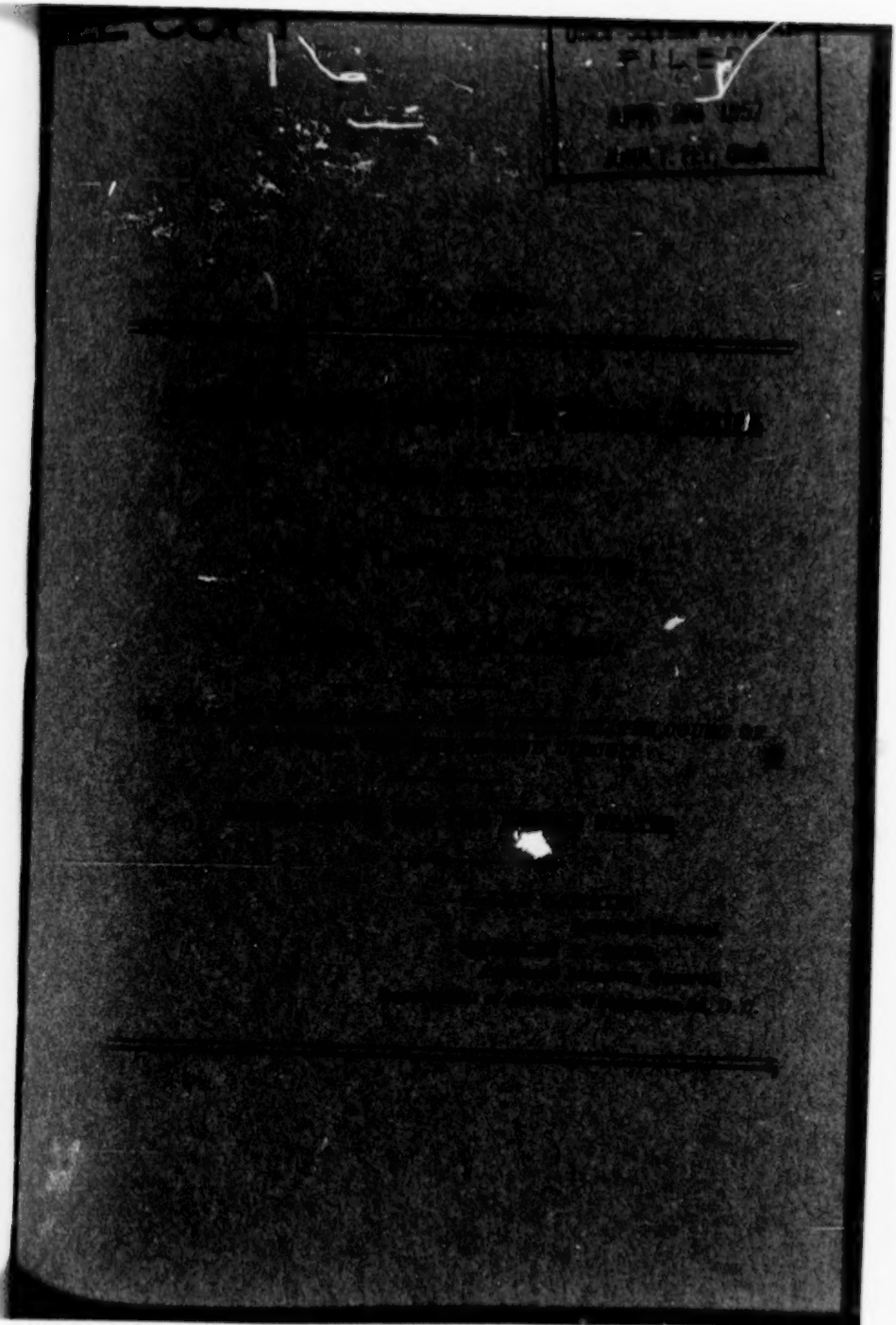
[20] See also *United States* v. *H.J.K. Theatre Corp.*, 236 F.2d 502, certiorari denied *sub nomine Ansell* v. *United States*, 352 U.S. 969; *United States* v. *Achilli*, 234 F.2d 797, certiorari granted, 352 U.S. —. In both of these cases, the concurrent terms of imprisonment actually imposed under § 145 (b) resulted in a shorter aggregate sentence than if the defendant had been given consecutive terms under § 3616 (a).

and a fine of $1,000.00 under Count Four, the terms of imprisonment to run concurrently.

Respectfully submitted,

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
AGNES A. NEILL.

March, 1957.



In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The questions presented in this case are substantially identical to those involved in Nos. 430 and 834, *Achilli* v. *United States*. For the reasons stated in its brief in the latter case, to which the Court is respectfully referred, the Government submits that the judgment of the Court of Appeals in the instant case should likewise be affirmed.

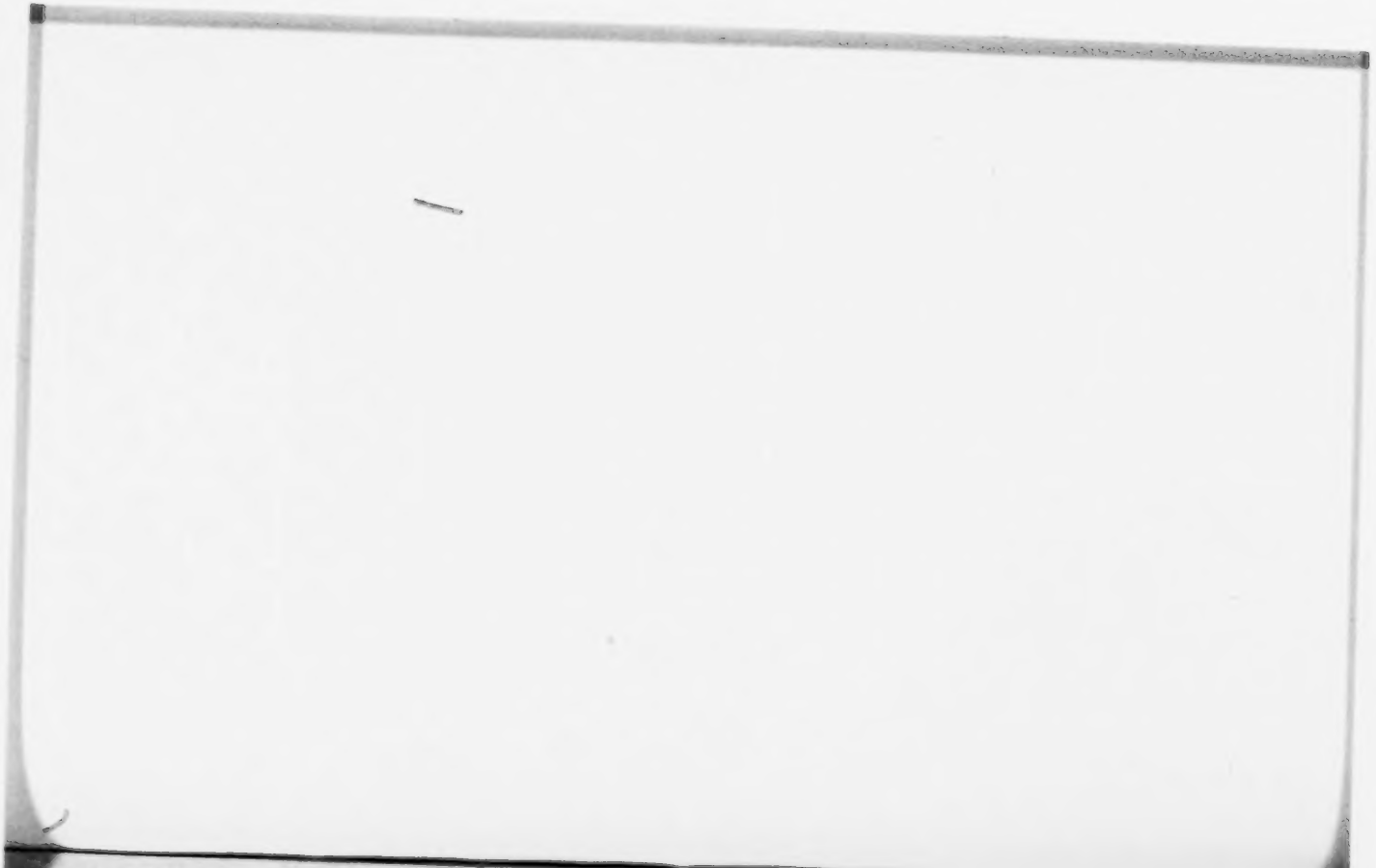
Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.

APRIL 1957.

424639—57

U. S. GOVERNMENT PRINTING OFFICE: 1957



LE COPY

Office - Supreme Court, U.
FILED
MAY 1 1957
JOHN T. FEY, Clerk

No. 666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

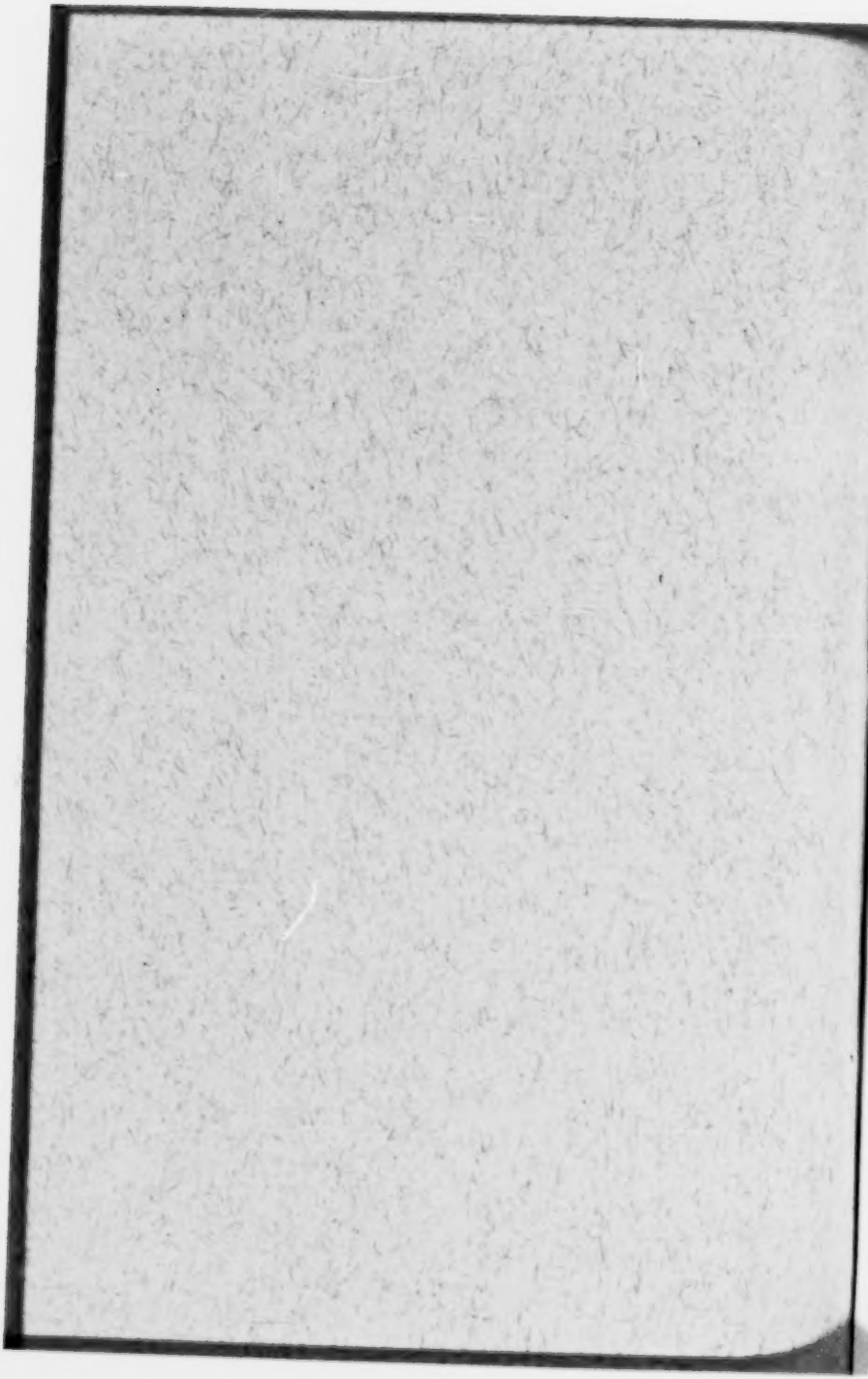
---

REPLY BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS,
AGNES A. NEILL,
1000 Hill Building,
Washington 6, D. C.,

MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
120 Broadway,
New York 5, New York,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



CITATIONS

Cases: Page

Achilli v. United States, Nos. 430 and 854, October Term, 1956 ..... 2, 3, 7
Berra v. United States, 351 U.S. 131 ..... 2, 7
Spies v. United States, 317 U.S. 492 7
United States v. Gilliland, 312 U.S. 86 6
United States v. Beacon Brass Co., 344 U.S. 43 .... 6, 7

Statutes:

18 U.S.C. § 1001 6
Internal Revenue Code of 1939:
Section 145 (b) 1, 2, 5, 6
Sections 1250-1253 3
Sections 1900-1907 3
Sections 2490-2494 ..... 3, 4
Section 3616 (a) 1, 2, 3, 4, 5, 6
Tariff Act of 1930, § 591, 46 Stat. 750 4
"Hot Oil" Act of 1935, 49 Stat. 30 6
R.S. § 3179 3
Criminal Code, § 35 ..... 6, 7

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 7 (c) .. 5
Federal Rules of Criminal Procedure, Rule 12 (b) .. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

In its memorandum consenting to certiorari herein, the United States conceded that § 3616 (a) of the Internal Revenue Code of 1939 applies to income tax returns. Petitioner's brief on the merits was therefore concerned only with the consequences of the conceded overlap of § 145 (b) and § 3616 (a) in income tax cases.

Instead of filing a brief on the merits in this case, the government filed a memorandum adopting its brief in the case of *Achilli* v. *United States,* Nos. 430 and 834.* This brief contains a complete repudiation of the government's prior concessions concerning the applicability of § 3616 (a) to income tax returns. The first section of petitioner's reply brief deals with this new issue thus interjected into the case. The second section of petitioner's reply brief deals with several new points raised by the government concerning the consequences of an assumed overlap of § 145 (b) and § 3616 (a).

I.

In the case of *Berra* v. *United States,* 351 U.S. 131, the Solicitor General conceded that § 3616 (a) applies to income tax returns. This concession was buttressed with an impressive list of authorities quoted in this petitioner's brief at p. 6. It was repeated in the case at bar, as well as in several other cases presenting the same question.

So confident was the government of the considerations behind this concession that it prosecuted numerous "minor" income tax offenders under § 3616 (a).

* The government's memorandum asserts that the questions presented in this case "are substantially identical to those involved" in the *Achilli* case, and petitioner will attempt no distinction between the two cases herein. It should be noted, however, that the sentence in the *Achilli* case has been reduced to the misdemeanor level (Br. 10-11). It should also be noted that petitioner in the *Achilli* case urges that the overlap of § 145 (b) and § 3616 (a) prohibits the imposition of any sentence whatsoever, while petitioner in the case at bar merely urges that the overlap of these two statutes prohibits the imposition of a sentence in excess of the maximum penalty under § 3616 (a).

Since October of 1952, the government admits that it has invoked this section in no less than 177 cases (Br. 14). In January of 1957, however, this Court granted certiorari in the case at bar. Two months later, the Attorney General gave orders that no further income tax prosecutions were to be instituted under § 3616 (a) pending determination of its scope by this Court (Br. 14). One month later, the Solicitor General filed his brief in the *Achilli* case, urging this Court to hold that § 3616 (a) is inapplicable to income tax returns.

The Solicitor General's *post litem motam* position on this point was anticipated and answered in an *amicus curiae* brief filed in the *Achilli* case on behalf of L. B. Binion. This petitioner desires to add only one point to the arguments of *amicus*. The government's brief in the *Achilli* case urges that R.S. § 3179, the predecessor of § 3616 (a), was superseded by a series of statutes punishing attempts to evade various federal taxes as felonies. By 1939, the government contends that § 3616 (a) "had been so thoroughly superseded by later, specific legislation that it probably applied only to three obscure kinds of taxes, not including the income tax, for which there appeared to have been no evasion or false returns provisions in the acts themselves," namely, the excise tax on certain fish, animal, and vegetable oils (§§ 2490-2494, Internal Revenue Code of 1939), the tax on certain bank notes (§§1900-1907, Internal Revenue Code of 1939), and the excise tax on certain transfers of stock or securities to foreign corporations to avoid income taxes (§§ 1250-1253, Internal Revenue Code of 1939) (Br. 7, 28).

It is interesting to note that, under the government's theory, this brief list is probably too long. Section 2493 provides that the fish oil tax should be collected in the same manner as a duty imposed by the Tariff Act of 1930, and should be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by this Act, with certain exceptions not here material. Section 591 of the Tariff Act, 19 U.S.C. § 1591, provides penalties for its evasion similar to those provided for evasion of the income tax. Since there is thus "specific" legislation dealing with evasion of the fish oil tax, the government's own argument leads to the conclusion that § 3616 (a) cannot even be applied to this tax, but must be restricted to the bank note and stock transfer taxes.

The government's interpretation of § 3616 (a) compliments the scholarship of the committee which drafted the 1939 Code, but it scarcely comports with common sense. Common sense decrees that Congress did not include this section in the Code because it was concerned with evasion of these two or three "obscure" taxes. The Solicitor General has not pointed to any prosecution under § 3616 (a) for evasion of these three taxes during the past eighteen years, and petitioner is aware of none. The irresistible conclusion is that the Solicitor General was right the first time, and that Congress intended to punish the filing of *any* false tax return as a misdemeanor. Perhaps Congress might have adopted the statutory scheme now suggested by the government had it been sufficiently prescient to predict the present problem, but the unrestricted scope of the statutory language is eloquent proof that it did not do so.

It appears that the government's present construction of § 3616 (a) is influenced by the fact that only seven persons are now serving sentences imposed under § 3616 (a) for income tax violations, whereas some few more are presumably now serving sentences imposed under § 145 (b) (Br. 15). It should be noted that the problem presented by this case cannot recur under the Internal Revenue Code of 1954, as pointed out in petitioner's main brief at p. 18. In any event, petitioner's constitutional rights cannot be made to hinge upon the number of persons similarly situate. As the Solicitor General himself concedes, his statistics cannot form a valid predicate for application of § 145 (b) to cases of this character (Br. 15). An unconstitutional statutory scheme does not become constitutional by virtue of old age or frequent application.

II.

Assuming *arguendo* the applicability of § 3616(a) to income tax returns, the Solicitor General urges that petitioner's argument is nothing more than a belated attack on the form of the indictment, which should have been raised by a pretrial motion to dismiss under Rule 12 (b) of the Federal Rules of Criminal Procedure. This suggestion completely and conveniently ignores Rule 7 (c) of the Federal Rules of Criminal Procedure, which provides that error in the citation of the statute allegedly violated shall not be ground for dismissal of an indictment unless it misleads the defendant to his prejudice. Here the indictment plainly charged an offense under § 3616 (a). Under Rule 7 (c), the fact that it cited § 145 (b) as the statute allegedly violated would not support a motion to dismiss.

The Solicitor General goes on to concede that the proof required under § 145 (b) and § 3616 (a) is identical in prosecutions for filing false income tax returns, assuming the applicability of the latter statute to cases of this character. He tacitly concedes that this petitioner could not be given cumulative sentences under both statutes for the same course of conduct. He urges, however, that this fact "provides all the more reason why the two statutes may co-exist" (Br. 39).

In support of this conclusion, the government relies principally upon *United States* v. *Gilliland*, 312 U.S. 86, and *United States* v. *Beacon Brass Co.*, 344 U.S. 43. Neither one of these cases in fact supports the government's position. In the *Gilliland* case, this Court merely rejected defendant's contention that the so-called Hot Oil Act of 1935, 49 Stat. 30, impliedly repealed § 35 of the Criminal Code, now 18 U.S.C. § 1001. It did not determine whether these two statutes required the same proof, and hence it was not called upon to decide the consequences of such overlap. Here, of course, the crux of petitioner's argument is that neither § 145 (b) nor § 3616 (a) has been repealed, and that the resultant overlap has deprived him of his constitutional rights.

Moreover, it appears that the two statutes involved in *Gilliland* did not require the same proof. The Hot Oil Act made it a misdemeanor to violate any regulation promulgated thereunder. The applicable regulation required the filing of certain reports, and provided that those reports must make full, truthful, and complete disclosure of the information sought. 35 F. Supp. at 184. Section 35 of the Criminal Code, on the other hand, punished false statements to government agencies. It would seem that the Hot Oil regulations pun-

ished mere omission, while § 35 required an affirmative act, *i.e.*, the filing of a false statement. Cf. *Spies* v. *United States*, 317 U.S. 492.

Equally inapposite is the *Beacon Brass* case. There this Court was careful to emphasize that the statutes before it *required different proof*. See opinion of Mr. Justice Black, dissenting, in *Berra* v. *United States*, 351 U.S. at 138-139. Under these circumstances, the government was free to prosecute under both statutes, and the defendant could not be heard to complain if it elected to proceed under only one of them. Virtually all of the lower court decisions cited at pp. 42-43 of the government's brief in *Achilli* must be distinguished from the case at bar on this same ground.

In conclusion, the Solicitor General urges that there has been no denial of equal protection in this case because there has been no interference with the court's discretionary sentencing power. The fact is, however, that the prosecutor's claim of authority to invoke either felony or misdemeanor provisions does interfere with the court's discretionary sentencing power. It is true that a trial judge can impose a one-year sentence under an indictment charging that the defendant attempted to evade and defeat the income tax by filing a false return. But a trial judge cannot impose a five-year sentence under an *information* charging that the defendant filed a false return with intent to defeat and evade the income tax. No matter how serious the circumstances of the offense or how dangerous the propensities of the offender, the judge in the latter case is restricted by the sentencing provisions of the misdemeanor statute.

It is petitioner's position that this arbitrary discrimination between defendants who have committed identi-

cal offenses under identical circumstances seriously interferes with the court's "discretionary sentencing power." The government has produced no authority to sustain such unequal protection of the laws. Consequently, petitioner urges that he is entitled to the relief demanded in his brief on the merits.

Respectfully submitted,

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
OSMOND K. FRAENKEL,
AGNES A. NEILL.

APRIL, 1957

bail, and

No. 666. COSTELLO *v.* UNITED STATES. Certiorari, 352 U. S. 988, to the United States Court of Appeals for the Second Circuit.

Per Curiam: Petitioners in both the above cases have applied to individual Justices for bail under Rule 46 of the Federal Rules of Criminal Procedure. The relevant legal circumstances concerning bail are identical in both cases. Both were convicted of income tax evasion involving § 145 (b) of the Internal Revenue Code of 1939. Both were sentenced to imprisonment for five years on each of three counts, the sentences to run concurrently. Both contend that they should have been sentenced under § 3616 (a) of the Internal Revenue Code of 1939, which makes it a misdemeanor (punishable by a

maximum of one year's imprisonment) to file a false return with intent to evade tax, the offense for which each was convicted. The question petitioners raise was discussed but not decided in *Berra* v. *United States*, 351 U. S. 131. This question is presented in *Achilli* v. *United States*, No. 430, which the Court has set for hearing during the week of April 29. Pending final determination of this question, we think petitioners are entitled to bail, the Government having presented no adequate reason why bail should not be granted. Accordingly, petitioners are admitted to bail, pending the disposition of the *Achilli* case, by executing a good and sufficient bail bond in the sum of $25,000, the same to be approved by a district judge of the court in which petitioners were convicted. Following approval, the bond will be posted with the clerk of the district court.

Jacob Kossman for Binion. *Edward Bennett Williams* and *Morris Shilensky* for Costello. *Solicitor General Rankin* for the United States. Reported below: No. 666, 239 F. 2d 177.